136-408

TRANSCRIPT OF RECORD.

THE LAW ASSOCIATION
OF
PHILADELPHIA.

136-408

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1889.

No. 296.

THE RICHELIEU AND ONTARIO NAVIGATION COMPANY, PLAINTIFF IN ERROR,

vs.

THE BOSTON MARINE INSURANCE COMPANY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MICHIGAN.

FILED FEBRUARY 19, 1887.

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1 UNITED STATES OF AMERICA, ss:

The President of the United States to the honorable the judge of the circuit court of the United States for the eastern district of Michigan, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you or some of you, between The Richelieu and Ontario Navigation Company, as plaintiff, and The Boston Marine Insurance Company, as defendant, a manifest error hath happened to the great damage of the said Richelieu and Ontario Navigation Company, as by its complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Morrison R. Waite, Chief Justice of the said Supreme Court, the 29th day of December, in the year of our Lord one thousand eight hundred and eighty-six.

Seal of the Circuit Court, Eastern District of Michigan.

WALTER S. HARSHA,
Clerk of the Circuit Court of the United States for the Eastern District of Michigan.

Allowed by—
H. B. BROWN,
Dist Judge.

1½ [Endorsed:] 7137. The Richelieu & Ontario Navigation Co. *v.* The Boston Marine Insurance Co. Writ of error. Issued & filed Dec. 29, 1886. Walter S. Harsha, clerk.

2 The United States of America to The Boston Marine Insurance Company, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the eastern district of Michigan, wherein The Richelieu & Ontario Navigation Company is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error men-

tioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Henry B. Brown, judge of the district court of the United States for the eastern district of Michigan, this 29th day of December, in the year of our Lord one thousand eight hundred and eighty-six.

HENRY B. BROWN,
Dist. Judge.

[Endorsed:] 7137. The Richelieu & Ontario Navigation Co. *v.* Boston Marine Ins. Co. Citation with proof of service. Filed Dec. 29, 1886. Walter S. Harsha, cl'k.

On this twenty-ninth day of December, in the year of our Lord one thousand eight hundred and eighty-six, personally appeared Percy G. Turner before me, the subscriber, and makes oath that he delivered a true copy of the within citation to H. H. Swan in his office, in Detroit, at 4 o'clock p. m.

PERCY G. TURNER.

Sworn to and subscribed the 29th day of December, A. D. 1886.
WALTER S. HARSHA,
Notary Public, Wayne Co., Mich.

3 *Bond on Writ of Error.*

Know all men by these presents that we, the Richelieu and Ontario Navigation Company, a corporation organized under the laws of Canada, and William A. Moore and Frank H. Canfield, of Detroit, as sureties, are held and firmly bound unto the Boston Marine Insurance Company in the full and just sum of two hundred and fifty ($250.00) dollars to be paid to the said Boston Marine Insurance Company, its certain attorney, successors, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this twenty-ninth day of December, in the year of our Lord one thousand eight hundred and eighty-six.

Whereas lately, at a session of the circuit court of the United States for the eastern district of Michigan, in a suit depending in said court between The Richelieu and Ontario Navigation Company, as plaintiff, and the said Boston Marine Insurance Company, as defendant, judgment was rendered against the said Richelieu and Ontario Navigation Company, and the said The Richelieu and Ontario Navigation Company having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the said judgment in the aforesaid suit, and a citation directed to the said The Boston Marine Insurance Company citing and admonishing it to be and appear at a Supreme Court of the United States to be holden at Washington the second Monday of October next:

Now, the condition of the above obligation is such that if the said The Richelieu and Ontario Navigation Company shall prosecute its

said writ of error to effect and answer all damages and costs if it fail to make its plea good, then the above obligation to be void; else to remain in full force and virtue.

L. A. SENECAL, *President.* [SEAL.]
J. N. BEAUDRY, *Sec'ty.* [SEAL.]
WM. A. MOORE, [SEAL.]
FRANK H. CANFIELD. [SEAL.]

Sealed and delivered in presence of—
As to the signatures of L. A. Senecal and J. N. Beaudry:
ALVA MILLOY.
As to signatures by sureties:
JULIA LINCOLN.

Approved by—
H. B. BROWN.

Endorsed: 7137. Bond. The Richelieu and Ontario Navigation Company to the Boston Marine Insurance Company. Filed Dec. 29, 1887. Walter S. Harsha, clerk.

4 *Transcript on Removal from Wayne Circuit Court.*

Declaration.

STATE OF MICHIGAN, } ss:
County of Wayne, }

The Circuit Court for the County of Wayne.

The Richelieu and Ontario Navigation Company, a corporation organized and existing under the laws of the Dominion of Canada, and which is a citizen of the Dominion of Canada, plaintiff, by Moore & Canfield, its attorneys, comes and files this declaration as commencement of suit, and complains of The Boston Marine Insurance Company of Boston, a corporation existing under the laws of the State of Massachusetts and a citizen of the State of Massachusetts, defendant, doing business in the State of Michigan and having an agent in said State and in the eastern district thereof duly authorized to receive service of process, according to the laws of Michigan, in a plea of trespass on the case upon promises—

For that whereas the said defendant heretofore, to wit, on the first day of May, A. D. 1883, to wit, at Detroit, in said district, for and in consideration of a certain premium, to wit, two hundred and seventy (270) dollars, secured to be paid to the defendant by a certain promissory note for said sum of two hundred and seventy (270) dollars, at six months from May first, 1883, which premium note was then and there delivered by the plaintiff to the defendant, the receipt whereof is in said policy acknowledged by the said defendant, did make, execute, and deliver to the plaintiff its certain policy of insurance, the date whereof is the first day of May, 1883, whereby the said defendant did make insurance and cause ten thousand dollars to be insured upon the body, tackle, apparel, and

other furniture of the iron steamer called the Spartan, of which the plaintiff was then the sole owner, from noon of the first day of April, 1883, to noon of the 30th day of November, 1883, by which policy it was declared that, touching the adventures and perils which the said defendant insurance company is content to bear and take upon itself by said policy, they are of the lakes, rivers, canals, jettisons, that should come to the damage of said vessel or any part thereof, excepting all perils, losses, misfortunes, or expenses consequent upon and arising from or caused by the following or other legally excluded causes, namely, damage that may be done by the said vessel to any other vessel or property; incompetency of the master or insufficiency of the crew or the want of ordinary skill in navigating said vessel and in loading, stowing, and securing the cargo of said vessel; rottenness, inherent defects, overloading, and all other unseaworthiness; theft, barratry, or robbery; charges, damage, or loss in consequence of the seizure or detention for or on account of an illicit or prohibited trade, or any trade in articles contraband of war; any claim for wages or provisions furnished to officers or crew while the property insured may be detained by any disaster or during subsequent repairs, excepting always services rendered in protecting, recovering, and securing the vessels or property covered by said policy; anchors being cast without being properly or sufficiently buoyed; gangways and openings through the deck being improperly or insecurely secured or protected.

And the plaintiff avers that by said policy the said defendant, for the consideration hereinbefore mentioned, did insure the said plaintiff against all loss which might happen to the said steamer during the period mentioned in said policy on account of the perils of the lakes, rivers, canals, jettisons that should come to the damage of said steamer or any part thereof, other than the perils excepted as aforesaid, from noon of the first day of May, 1883, to noon of the thirtieth day of November, 1883, and did thereby agree to pay all losses covered by said policy in sixty days after proof of such loss or damage and proof of the interest of the assured should be made and presented at the office of the said defendant.

And the plaintiff also avers that after the execution and delivery of the said policy of insurance as aforesaid, and while the same was in full force and effect, the said steamer Spartan, while on a voyage from the port of Fort William, in the Dominion of Canada, to the port of Owen Sound, in said dominion, and while crossing Lake Superior, was, on the nineteenth day of June, 1883, by and through the perils and dangers of the lakes and seas, stranded and became hard-aground on the southeast point of Caribou Island, and by reason of such stranding and on account of the violence of the winds, waves, and currents of the lake said steamer then and there became greatly broken, sunken, and injured, and became and was totally lost and destroyed, and was abandoned by the plaintiff as a total loss, of all which the said defendant had notice.

And plaintiff further avers that at the time of the stranding

grounding, loss, and abandonment of said steamer the said plaiutiff was the sole, true, and *bona fide* owner of said steamer; that she was of great value, to wit, of the value of fifty thousand dollars; that afterwards due proof of loss and damage suffered by the plaintiff under said policy and of the interest of the plaintiff as the assured were presented and served upon the said defendant, and that all the conditions and agreements contained in said policy to be kept and performed by the plaintiff were kept and performed by the plaintiff; that more than sixty days have elapsed since the furnishing of said proofs of loss as aforesaid, and that by reason of the premises the said defendant became liable to pay to the plaintiff, under its said policy, the sum of ten thousand dollars, and being so liable the said plaintiff, afterwards, to wit, at Detroit, in said district, promised the plaintiff to pay it the said sum of ten thousand dollars when it, the said defendant, should be thereunto afterwards requested, yet the said defendant, although often requested so to do, has not yet paid the plaintiff said sum of ten thousand dollars, or any part thereof.

And whereas, also, the said defendant, on first day of May, 1883, to wit, at Detroit, in said district, for and in consideration of a certain premium note for the sum of two hundred and seventy (270) dollars, to become due in six months after May first, 1883, which said note was delivered by the plaintiff to the defendant,
6 and the receipt whereof was duly acknowledged by the said defendant—it, the said defendant, did make, execute, and deliver to the plaintiff a certain other policy of insurance, dated the first day of May, 1883, whereby the said defendant did make insurance and cause ten thousand dollars to be insured upon the body, tackle, apparel, and other furniture of the steamer Spartan, of which said steamer the said plaintiff was then and at the time of the happening of the loss hereinafter mentioned was the sole, true, and *bona fide* owner, and which was of great value, to wit, of the value of fifty thousand dollars, from noon of the first day of May, 1883, to noon of the thirtieth day of November, A. D. 1883, and by which said policy the said defendant did insure the said plaintiff against the adventures and perils of the lakes, rivers, canals, and jettisons which should come to the damage of said vessel or any part thereof; all losses under said policy by terms thereof being made payable in sixty days after proof of said loss or damage and of the amount thereof and proof of the interest of the assured should be presented at the office of said company. And the plaintiff avers that afterwards and while said policy was still in full force, to wit, on the 19th day of June, 1883, said steamer, whilst proceeding upon a voyage from the port of Fort William and bound for the port of Owen Sound, and while crossing Lake Superior on said voyage, was, by the perils and dangers of the lakes, wrecked, and by the stormy and tempestuous weather and by the violence of the winds and waves broken and totally lost, whereby the said plaintiff suffered a loss and damage in the sum of fifty thousand dollars, of all which the said defendant had notice; that due notice of abandonment and proofs of loss and of the interest of the plaintiff, as the assured, were

presented and served by the plaintiff upon the said defendant, and that the said plaintiff in all things duly observed and performed all the covenants, conditions, and agreements in said policy on its part to be kept, observed, and performed; that more than sixty days have elapsed since said proofs of loss were served and presented to the defendant, and that, by reason of the premises and of the terms and conditions of said policy, the said defendant became liable to pay to the plaintiff the said sum of ten thousand dollars, being the amount insured under said policy, and, being so liable, the said defendant afterwards, to wit, at Detroit, in said district, promised the plaintiff to pay it said sum of ten thousand dollars — or any part thereof, to the damage of the plaintiff of twelve thousand dollars — note for the sum of two hundred and seventy dollars (270.00) to become due in six months after May 1st, 1883, which said note was delivered by the Owen Sound Steamship Company to the defendant, and the receipt whereof was duly acknowledged by the said defendant, it, the said defendant, did make, execute, and deliver to the Owen Sound Steamship Company, which was then the charterer of the steamer "Spartan," a certain other policy of insurance, dated the 21st day of April, 1883, whereby the said defendant did make insurance and cause ten thousand dollars ($10,000)

7 to be insured upon the body, tackle, apparel, and other furniture of the steamer "Spartan," loss, if any, payable to the plaintiff, of which said steamer the said Owen Sound Steamship Company was the charterer, and plaintiff was then and at the time of the happening of the loss hereafter mentioned the sole, true, and *bona fide* owner, and which was of great value, to wit, of the value of fifty thousand dollars, from noon of the first day of May, 1883, to noon of the 30th day of November, A. D. 1883, and by which said policy the said defendant did insure the said plaintiff against the adventures and perils of the lakes, rivers, canals, and jettisons which should come to the damage of said vessel or any part thereof, all losses under said policy, by the terms thereof, being made payable in sixty days after proof of said loss or damage and of the amount thereof and proof of the interest of the assured should be presented at the office of said company; and the plaintiff further says that afterwards and while said policy was still in force, to wit, on the 19th day of June, 1883, said steamer, while proceeding upon a voyage from the port of Fort William and bound for the port of Owen Sound, and while crossing Lake Superior on said voyage, was, by the perils and dangers of the lakes and by the force and violence of certain waves and winds and stormy weather, stranded upon certain rocks and shoals at or near Cariboo Island, so called, and thereby became and was greatly strained, broken, shattered, damaged, and spoiled, and was in great danger of being totally destroyed; that to rescue said steamer from her stranded condition it became necessary to employ divers, steam-tugs, steam-pumps, and other appliances, and after the said steamer was gotten off of said rocks and from her stranded situation said steamer was then and there necessarily forced and obliged to proceed and did proceed to the port of Detroit, and

was there repaired, and in consequence of which said several premises and of the charges and expenses occasioned thereby the plaintiff necessarily suffered and sustained an average loss, to wit, an average loss of 80 per cent. upon the value of said steamer, due the assured aforesaid, and in consequence thereof the defendant then and there became liable to pay to the said plaintiff a certain sum of money, to wit, the sum of ten thousand dollars ($10,000), being its proportion of the said average loss for and in respect of the said sum of ten thousand dollars ($10,000), so by it assured as aforesaid, of all which said premises the said defendant afterwards, to wit, on the day and year last aforesaid, to wit, Detroit, in said county, had notice.

And whereas also the said defendant, on the 21st day of April, 1883, to wit, at Detroit, in said county, for and in consideration of a certain premium note for the sum of two hundred and seventy dollars ($270.00), to become due in six months after May 1st, 1883, which said note was delivered by the Owen Sound Steamship Company to the defendant and the receipt whereof was duly acknowledged by the said defendant, it, the said defendant, did make, execute, and deliver to the Owen Sound Steamship Company, which was then the charterer of the steamer "Spartan," a certain other policy of insurance, dated the 21st day of April, 1883, whereby said defendant did make insurance and cause ten thousand dollars
(10,000) to be insured upon the body, tackle, apparel,
8 and other furniture of the steamer "Spartan," loss, if any, payable to the plaintiff, of which said steamer the Owen Sound Steamship Company was the charterer, and plaintiff was then and at the time of the happening of the loss hereinafter mentioned the sole, true, and *bona fide* owner, and which was of great value, to wit, of the value of fifty thousand dollars ($50,000), from noon of the last day of May, 1883, to noon of the 30th day of November, A. D. 1883, and by which said policy the said defendant did insure the said plaintiff against the adventures and perils of the lakes, rivers, canals, and jettisons which should come to the damage of said vessel or any part thereof, all losses under said policy, by the terms thereof, being made payable in sixty days after proof of said loss or damage and of the amount thereof and proof of the interest of the assured should be presented at the office of said company; and the plaintiff further says that afterwards and while said policy was still in force, to wit, on or about the 10th day of June, 1883, the said steamer, while proceeding upon a voyage from the port of Fort William and bound for the port of Owen Sound and while crossing Lake Superior, on said voyage, was, by and through the force and violence of certain winds, waves, and stormy weather and by the perils and dangers of the lakes, driven against certain rocks, and did thereby founder and become stranded, and sank at or near Cariboo Island, so called, and was thereby greatly strained, broken, shattered, damaged, and spoiled, and was in eminent [imminent] danger of being totally destroyed, and that in order to rescue said steamer and repair the damage done to said steamer it was necessary to employ divers,

steam-tugs, steam-pumps, and other wrecking apparatus and appliances and to transport said steamer to the port of Detroit in order to repair the damage; that the cost of raising and rescuing said steamer and to repair the damage aforesaid amounted to a large sum, to wit, the sum of forty thousand dollars ($40,000), and that the amount which the insurers on said steamer would be liable to pay on account of the said expense and damage under an adjustment of a partial loss would exceed one-half of the amount by them insured, and amounted to a constructive total loss of said steamer, and that thereupon the plaintiffs abandoned said steamer to the said insurers, of all which the said defendants had notice, and that by reason of the premises the said defendant became liable to pay to the plaintiff said sum of ten thousand dollars ($10,000), being the sum by it insured as aforesaid; of all which said premises the said defendant afterwards, to wit, on the day and year last aforesaid, had notice.

For that whereas, also, the defendant heretofore, to wit, on the first day of April, A. D. 1884, at Detroit, in said county of Wayne, was indebted to the plaintiff in the sum of — dollars for the price and value of goods then and there sold and delivered by the plaintiff to the defendant at its request.

And in a like sum for the price and value of work then and there done and materials for the same provided by the plaintiff for the defendant at its request.

And in a like sum for money then and there lent by the plaintiff to the defendant at — request.

And in a like sum for money then and there paid by the plaintiff for the use of the defendant at its request.

9 And in a like sum for money then and there received by the defendant for the use of the plaintiff.

And in a like sum for money then and there found to be due from the defendant to the plaintiff on an account stated between them.

And thereupon the said defendant afterwards, and on the day and year aforesaid, in consideration of the premises, respectively, then, and there promised the plaintiff to pay it the said several sums of money, respectively, on request; yet the said defendant has disregarded said promises and has not, although often requested so to do, paid any of the sums of money, or any part thereof, to the plaintiff's Damage of twelve thousand dollars; therefore it brings suit, etc.

MOORE & CANFIELD,
Plaintiff's Attorneys.

In the Circuit Court of the County of Wayne.

THE RICHELIEU AND ONTARIO NAVIGATION COMPANY
vs.
THE BOSTON MARINE INSURANCE COMPANY.

STATE OF MICHIGAN, } *ss*:
County of Wayne, }

Henry A. Mandell, being duly sworn, deposes and says that on the 9th day of April, 1884, he served the declaration filed in the

above-entitled cause and hereto attached on Frank O. Davenport, the attorney authorized by the defendant above named to accept service of process issued against said defendant in the State of Michigan, by delivering him personally a true copy of said declaration, with rule to plead endorsed thereon as is endorsed on the declaration attached hereto.

HENRY A. MANDELL.

Subscribed and sworn to before me this 9th day of April, 1884.

JESSE P. WARNER,
Notary Public, Wayne Co., Mich,

10 STATE OF MICHIGAN, *ss:*

The Circuit Court for the County of Wayne.

THE BOSTON MARINE INSURANCE COMPANY, Defendant,
ads.
THE RICHELIEU AND ONTARIO NAVIGATION COMPANY, Plaintiff.

The defendant, The Boston Marine Insurance Company, by Maynard & Swan, its attorneys, comes and demands a trial of the matters set forth in the plaintiff's declaration.

MAYNARD & SWAN,
Attorneys for Defendant.

Please to take notice that the said defendant will, on the trial of this cause, insist upon and give in evidence under the general issue above pleaded that before and at the time of the commencement of this suit the said plaintiff was and still is indebted to the said defendant in the sum of ten thousand dollars for the price and value of goods before then sold and delivered by the defendant to the plaintiff at plaintiff's request.

And in a like sum for the price and value of work then done and materials for the same provided by the defendant for the plaintiff at plaintiff's request;

And in a like sum for the price and value of work then done by the defendant for the plaintiff at plaintiff's request;

And in a like sum for the money then lent by the defendant to the plaintiff at plaintiff's request;

And in a like sum for money then paid by the defendant for plaintiff at plaintiff's request;

And in a like sum for money then received by the plaintiff for the use of the defendant;

And in a like sum for money then found to be due from the plaintiff to the defendant on an account stated between them;

And in a like sum for the use of money then due from the plaintiff to the defendant and by the defendant forborne to the plaintiff at plaintiff's request:

Which said several sums of money, or so much thereof as will be sufficient for that purpose, the said defendant will set off and allow to the plaintiff against any demand or demands of said plaintiff, to be

proved by plaintiff on said trial, and have the balance certified in defendant's favor.

Dated the third day of May, 1884.

Yours, etc., MAYNARD & SWAN,
Attorneys for Defendant.

Messrs. Moore & Canfield, attorneys for plaintiff.

11 Circuit Court for the County of Wayne.

THE RICHELIEU AND ONTARIO NAVIGATION COMPANY, Plaintiff,
vs.
THE BOSTON MARINE INSURANCE COMPANY, Defendant. } No. 23159.

To the honorable the circuit court for the county of Wayne:

The petition of The Boston Marine Insurance Company, defendant in the above-entitled cause, respectfully shows—

1. That this suit was commenced on or about the eighth day of April, A. D. 1884, in the said circuit court for the county of Wayne by the above-named Richelieu and Ontario Navigation Company, as plaintiff, against your petitioner, as defendant, and that the next term of this court, commencing Tuesday, September 16, 1884, is the term at which this cause could be first tried since the commencement of this suit.

2. That the said plaintiff is and was at the time said suit was commenced a citizen of the Dominion of Canada and an alien.

That your petitioner is and was at the time said suit was commenced a corporation organized and existing under the laws of the State of Massachusetts, having its principal office in said State, and is, within the meaning of the acts of Congress, a citizen of the said State of Massachusetts.

That the said plaintiff claims in the declaration in this suit as damages against your petitioner the sum of twelve thousand dollars, and that the matter in dispute in said suit exceeds the sum of five hundred dollars, exclusive of costs, and that this cause can be fully and finally determined in the circuit court of the United States for the eastern district of Michigan.

3. That your petitioner, the said defendant, is ready and willing to give good and sufficient surety as this court may direct for doing all the acts and things required to be done by the provisions of law upon the removal of the said suit into the circuit court of the United States, and offers herewith the bond of your petitioner, as principal, and Henry H. Swan, as surety, in the penal sum of five hundred dollars, conditioned that your petitioner shall enter in the next circuit court of the United States for the eastern district of Michigan, on the first day of its next term or session, copies of all process, pleadings, and other proceedings in the said suit and doing such other appropriate acts as by the acts of Congress are required to be done upon the removal of a suit into the said circuit court of the United States.

12 Wherefore your petitioner prays that the said bond may

be accepted as good and sufficient surety according to the said provisions of law; that your petitioner may have leave to remove the said cause into the said circuit court of the United States, pursuant to the statute in such case made and provided, and that all further proceedings in this court may be stayed; and your petitioner will ever pray, &c.

THE BOSTON MARINE INSURANCE COMPANY,
By MAYNARD & SWAN, *Its Attorneys.*

MAYNARD & SWAN,
Defendant's Attorneys.

Know all men by these presents that we, The Boston Marine Insurance Company of Massachusetts, as principal, and Henry H. Swan, of Detroit, Michigan, as surety, are held and firmly bound unto the Richelieu and Ontario Navigation Company in the sum of five hundred dollars, lawful money of the United States of America, to be paid to the said Richelieu and Ontario Navigation Company, its successors or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, and each of them, firmly by these presents.

Sealed with our seals. Dated the tenth day of September, A. D. 1884.

Whereas the said Richelieu and Ontario Navigation Company, as plaintiff, has commenced against The Boston Marine Insurance Company, as defendant, a certain suit in the circuit court for the county of Wayne; and whereas the said defendant has filed its petition in the said circuit court for the removal of said suit into the next circuit court of the United States for the eastern district of Michigan:

Now, therefore, the condition of this obligation is such that if the above-named Boston Marine Insurance Company shall enter or cause to be entered in the said circuit court of the United States, on the first day of its next term or session, copies of all process, pleadings, and other proceedings and a true copy of the record in the said suit, and do and cause to be done such other appropriate acts as are required to be done upon the removal of a suit into the circuit court of the United States, and shall pay all costs that may be awarded by the said circuit court if such court shall hold that such suit was wrongfully or improperly removed thereto, then the above obligation shall be void; otherwise it shall remain in full force and virtue.

THE BOSTON MARINE INSURANCE COMPANY OF MASSACHUSETTS, [L. S.]
By MAYNARD AND SWAN, [L. S.]
Its Attorneys-in-Fact.
HENRY H. SWAN. [L. S.]

13 STATE OF MICHIGAN, } ss:
County of Wayne, }

The surety named in the foregoing obligation, being duly sworn, deposes and says that he is a resident of the State of Michigan and is worth the sum of two thousand dollars over all just debts and liabilities in real estate, subject to execution in said county of ——.

—— ——.

Subscribed and sworn to before me this — day of ——, 1884.

—— ——.

Circuit Court for the County of Wayne.

THE RICHELIEU AND ONTARIO NAVIGATION COMPANY, Plaintiff,
vs.
THE BOSTON MARINE INSURANCE COMPANY, Defendant.

Please take notice that we are retained for the defendant in the above-entitled cause, and that upon the petition of the said defendant and the bond accompanying the same, and copies of which said petition and bond are hereto annexed and upon the files and records of said cause, we shall move the said court on the fifteenth day of September, A. D. 1884, at the opening of court in the morning of said day or as soon thereafter as counsel can be heard, for an order staying all proceedings in the said suit and for leave to remove the same to the circuit court of the United States for the eastern district of Michigan, as prayed in the said petition.

MAYNARD & SWAN,
Defendant's Attorneys.

To Messrs. Moore & Canfield, plaintiff's attorneys.

14 At a session of the circuit court for the county of Wayne, convened and held at the circuit court room, in the city of Detroit, onthe 15th day of September, in the year one thousand eight and hundred eighty-four.

Present: Hon William Jennsion, Hon. John J. Speed, Hon. F. H. Chambers, circuit judges.

THE RICHELIEU AND ONTARIO NAVIGATION COMPANY
vs.
THE BOSTON MARINE INSURANCE COMPANY.

On reading and filing petition for removal of this cause to the circuit court of the United States for the eastern district of Michigan, and it appearing therefrom that it is a proper cause for removal, and on motion of Maynard and Swan, attorneys for petitioner, ordered that said petition and bond filed therewith be accepted, and that no further proceedings be had in said suit in this court, but that the same be removed, as in said petition prayed.

Endorsed: 7137. Richelieu & Ontario Navigation Co. *vs.* Boston Marine Ins. Co. Transcript from Wayne circuit court. Filed Nov. 13, 1884. Walter S. Harsha, clerk.

15 *Order Entering Cause in This Court.*

At a session of the circuit court of the United States for the eastern district of Michigan, continued and held, pursuant to adjournment, at the district court room, in the city of Detroit, on Friday, the fourteenth day of November, in the year one thousand eight hundred and eighty-four.

Present: The Honorable Henry B. Brown, district judge.

THE RICHELIEU & ONTARIO NAVIGATION COMPANY
vs.
THE BOSTON MARINE INSURANCE COMPANY.

Case removed from Wayne county.

On filing a transcript of all papers filed and proceedings had in the circuit court for the county of Wayne, and on motion of Maynard & Swan, attorneys for defendant, it is ordered that said cause be, and the same is hereby, duly entered in this court as of the first day of the present term.

16 *Security for Costs.*

Circuit Court of the United States for the Eastern District of Michigan.

THE RICHELIEU & ONTARIO NAVIGATION COMPANY, Plaintiff,
vs.
THE BOSTON MARINE INSURANCE COMPANY, Defendant.

I, Stephen B. Grummond, acknowledge myself security for all costs for which the defendant may become liable in this suit.

S. B. GRUMMOND.

Detroit, November 11th, A. D. 1884.

Endorsed: No. 7137. U. S. circuit court, E. D. Mich. Richelieu & Ontario Navigation Company *vs.* The Boston Marine Ins. Co. Security for costs. Filed in clerk's office Nov. 14, 1884. Walter S. Harsha, clerk.

17 *Motion for Consolidation, &c.*

Circuit Court of the United States for the Eastern District of Michigan.

THE RICHELIEU & ONTARIO NAVIGATION COMPANY
vs.
THE BOSTON MARINE INSURANCE COMPANY.

THE RICHELIEU & ONTARIO NAVIGATION COMPANY
vs.
THE UNION INSURANCE COMPANY OF PHILADELPHIA.

THE RICHELIEU & ONTARIO NAVIGATION COMPANY
vs.
THE INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA,
and
THE RICHELIEU & ONTARIO NAVIGATION COMPANY
vs.
THE CONTINENTAL INSURANCE COMPANY.

Please to take notice that on Monday, December 15th, 1884, at the opening of court on that day, the defendants in the above-entitled causes will ask the court that the same may be consolidated upon the grounds stated in the motion, with a copy of which you are herewith served, and upon the affidavit filed in support thereof, a copy of which is hereto attached.

MAYNARD & SWAN,
Attorneys for Defendants.

To Moore & Canfield, attorneys for plaintiff.
Detroit, December 13, 1884.

18 Circuit Court of the United States for the Eastern District of Michigan.

THE RICHELIEU & ONTARIO NAVIGATION COMPANY
vs.
THE BOSTON MARINE INSURANCE COMPANY.

THE RICHELIEU & ONTARIO NAVIGATION COMPANY
vs.
THE UNION INSURANCE COMPANY OF PHILADELPHIA.

THE RICHELIEU & ONTARIO NAVIGATION COMPANY
vs.
THE INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA
and the
RICHELIEU & ONTARIO NAVIGATION COMPANY
vs.
THE CONTINENTAL INSURANCE COMPANY.

Now come the said defendants in the above-entitled cause, viz., The Boston Marine Insurance Company, The Union Insurance Company of Philadelphia, The Insurance Company of the State of Pennsylvania, and The Continental Insurance Company, by Maynard & Swan, their attorneys in said several causes, and move the court that said above-entitled causes may be consolidated under the provisions of section 921 of the Revised Statutes of the United States. This motion is based upon the files and records in said several causes and the affidavit of Henry H. Swan filed in support of this motion.

MAYNARD & SWAN,
Attorneys for the Above-Named Defendants.

19 EASTERN DISTRICT OF MICHIGAN, *ss:*

Henry H. Swan, being duly sworn, deposes and says that he is an attorney of this court and a member of the firm of Maynard & Swan, which said firm are the attorneys of record for the defendants in each of the above-entitled causes.

Deponent further says that the above-entitled causes are brought by the plaintiff therein named to recover from the defendants in said causes the respective amounts alleged to have been insured by each of said several defendants upon the steamer (Spartan), which the defendants claim to have been stranded and lost within the meaning of said policies on or about the 19th day of June, 1883, and that each of said suits are causes of like nature and relate to the same questions within the meaning of section 921 of the Revised Statutes of the United States.

HENRY H. SWAN.

Subscribed and sworn to before me this 13th day of December, A. D. 1884.

E. H. SELLERS,
Notary Public, Wayne County, Michigan.

Endorsed: No. 7137. U. S. circuit court for the eastern district of Michigan. The Richelieu and Ontario Navigation Co. *vs.* The Boston Marine Ins. Co. *et al.* Motion for consolidation of causes and affidavit with copy — notice. Filed Dec. 13, 1884. Walter S. Harsha, clerk.

20 *Order Denying Motion for Consolidation.*

At a session of the circuit court of the United States for the eastern district of Michigan, continued and held, pursuant to adjournment, at the district court room, in the city of Detroit, on Monday, the fifteenth day of December, in the year one thousand eight hundred and eighty-four.

Present: The Honorable Henry B. Brown, district judge.

RICHELIEU & ONTARIO NAVIGATION CO.
vs.
BOSTON MARINE INSURANCE CO.

RICHELIEU & ONTARIO NAVIGATION CO.
vs.
INSURANCE CO. OF STATE OF PENNSYLVANIA.

RICHELIEU & ONTARIO NAVIGATION CO.
vs.
UNION INSURANCE COMPANY.

RICHELIEU & ONTARIO NAVIGATION CO.
vs.
CONTINENTAL INSURANCE CO.

A motion on behalf of the defendants for the consolidation of these causes is argued by counsel for respective parties and denied.

21 *Motion for Order to Abide Result of One Suit, &c.*

Circuit Court of the United States for the Eastern District of Michigan.

THE RICHELIEU & ONTARIO NAVIGATION COMPANY
vs.
THE BOSTON MARINE INSURANCE COMPANY.

THE RICHELIEU & ONTARIO NAVIGATION COMPANY
vs.
THE UNION INSURANCE COMPANY OF NEW YORK.

THE RICHELIEU & ONTARIO NAVIGATION COMPANY
vs.
THE CONTINENTAL INSURANCE COMPANY OF NEW YORK.

THE RICHELIEU & ONTARIO NAVIGATION COMPANY
vs.
THE INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA.

Please to take notice that on Friday, December the 19th, 1884, at the opening of court on that day, the defendants in the above-entitled causes will ask the court that the order, a copy of which you are herewith served, may be entered in each of said causes.

MAYNARD & SWAN,
Attorneys for Defendants.

To Moore & Canfield, attorneys for plaintiffs.

22 Circuit Court of the United States for the Eastern District of Michigan.

THE RICHELIEU & ONTARIO NAVIGATION COMPANY
vs.
THE BOSTON MARINE INSURANCE COMPANY.

THE RICHELIEU & ONTARIO NAVIGATION COMPANY
vs.
THE UNION INSURANCE COMPANY OF PHILADELPHIA.

THE RICHELIEU & ONTARIO NAVIGATION COMPANY
vs.
THE CONTINENTAL INSURANCE COMPANY OF NEW YORK.

THE RICHELIEU & ONTARIO NAVIGATION COMPANY
vs.
THE INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA.

And now come the said defendants, The Boston Marine Insurance Company, The Continental Insurance Company of New York, The Insurance Company of the State of Pennsylvania, and The Union Insurance Company of Philadelphia, and move the court, under the provisions of section 921 of the Revised Statutes of the United States, that in each of the above-entitled causes the following order may be entered, viz: That all the above-entitled causes abide

the event and final determination of that one of said causes in which the plaintiff may elect to prepare the evidence and go to trial; and that if verdict and judgment in the case so tried shall be in favor of the plaintiff, verdict and judgment shall be entered against each of the several defendants in the above-entitled causes for such damages as might be awarded upon a verdict for plaintiff in each of said causes if tried; and that if verdict and judgment in the cause so elected to be tried by plaintiff as above provided be in favor of the defendant therein, that verdict and judgment be also entered in each of said above-entitled causes in favor of the several defendants above named:

Provided, however, That nothing in this order or in the judgment which may be entered in any or all of said causes shall affect or impair the right of the parties, plaintiffs or defendants, in each of said causes to move for a new trial thereof, take out a writ of error,
or otherwise review all such judgments as may be entered
23 under this order, "or that such other order may be made in
said causes under said section 921 as will obviate unnecessary costs in said causes. This motion is based upon the files and records in said several causes and the affidavit of Henry H. Swan, filed in support of this motion.

MAYNARD & SWAN,
Att'ys for Above-Named Defendants.

24 EASTERN DISTRICT OF MICHIGAN, *ss:*

Henry H. Swan, being duly sworn, deposes and says that he is an attorney of this court and a member of the firm of Maynard & Swan, which said firm are the attorneys of record for the defendants in each of the above-entitled causes.

Deponent further says that all the above-entitled causes are brought by the plaintiffs therein named to recover from the defendants in said causes the respective amounts alleged to have been insured by each of said several defendants upon the steamer "Spartan," which the defendants claim to have been stranded and become a total loss, within the meaning of said policies, on or about the 19th day of June, A. D. 1883, and that each of said suits are causes of like nature and relative to the same questions within the meaning of section 921 of the Revised Statutes of the United States, and that each of said causes are brought by the plaintiff against the several defendants above named; that the attorneys of said plaintiff in said cause are Moore & Canfield, of Detroit, Michigan.

HENRY H. SWAN.

Subscribed and sworn to before me this 18th day of December, A. D. 1884.

HERSCHEL WHITAKER,
Notary Public, Wayne County, Michigan.

Endorsed: No. 7137. U. S. circuit court for the eastern district of Michigan. The Richelieu & Ontario Navigation Company *vs.* The Boston Marine Ins. Co. *et al.* Motion for order and affidavit with copy of notice. Filed Dec. 19th, 1884. Walter S. Harsha, clerk.

25 *Order to Abide Result of One Suit.*

At a session of the circuit court of the United States for the eastern district of Michigan, continued and held, pursuant to adjournment, at the district court room, in the city of Detroit, on Tuesday, the tenth day of February, in the year one thousand eight hundred and eighty-five.

Present: The Honorable Henry B. Brown, district judge.

THE RICHELIEU & ONTARIO NAVIGATION COMPANY
vs.
THE BOSTON MARINE INSURANCE COMPANY.

THE RICHELIEU & ONTARIO NAVIGATION COMPANY
vs.
THE UNION INSURANCE COMPANY OF NEW YORK.

THE RICHELIEU & ONTARIO NAVIGATION COMPANY
vs.
THE CONTINENTAL INSURANCE COMPANY OF NEW YORK.

THE RICHELIEU & ONTARIO NAVIGATION COMPANY
vs.
THE INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA.

In these causes, on motion of Maynard & Swan, of counsel for the defendants, after hearing Mr. F. H. Canfield, of counsel for plaintiff, it is ordered that all of the above-entitled causes abide the event and final determination of that one of said causes in which the plaintiff may elect to prepare the evidence and go to trial, and that if verdict and judgment in the case so tried shall be in favor — the plaintiff verdict and judgment shall be entered against each of the several defendants in the above-entitled causes for such damages as might be awarded upon a verdict for plaintiff in each of said causes if tried, and that if verdict and judgment in the cause so elected to be tried by plaintiff, as above provided, be in favor of the defendant therein that verdict and judgment be also entered in each of the said above-entitled causes in favor of the several defendants above named: Provided, however, That nothing in this order or in the judgment which may be entered in any or all of said causes shall affect or impair the rights of the parties, plaintiffs or defendants, in each of said causes to move for a new trial thereof, to take out a writ of error, or otherwise review all such judgments as may be entered under this order.

The court reserved the right to qualify or modify this order hereafter.

26 *Trial.*

At a session of the circuit court of the United States for the eastern district of Michigan, continued and held, pursuant to adjournment, at the district court room, in the city of Detroit, on Tuesday, the tenth day of February, in the year one thousand eight hundred and eighty-five.

Present: The Honorable Henry B. Brown, district judge.

THE RICHELIEU & ONTARIO NAVIGATION COMPANY
vs.
THE BOSTON MARINE INSURANCE COMPANY.

The parties in this cause being in court by their respective attorneys ready for trial, thereupon comes a jury, namely, J. Elisha Winder, James A. Tiller, Norris O. Seeley, George Irwin, William T. Baer, James F. Brown, Daniel H. Covel, George C. Wyllis, Cornelius H. Bresnahan, Harvey H. Hitchcock, Martin P. Stockwell, and William Thorn, good and lawful men, who, being duly chosen, tried, and sworn well and truly to try the issue between the parties, sit together and hear a portion of the evidence in the case.

At a session of the circuit court of the United States for the eastern district of Michigan, continued and held, pursuant to adjournment, at the district court room, in the city of Detroit, on Wednesday, the eleventh day of February, in the year one thousand eight hundred and eighty-five.

Present: The Honorable Henry B. Brown, district judge.

THE RICHELIEU & ONTARIO NAVIGATION COMPANY
vs.
THE BOSTON MARINE INSURANCE COMPANY.

In this cause the jurors heretofore impaneled and sworn come into court again and sit together and hear further evidence in the case.

27 *Trial Continued.*

At a session of the circuit court of the United States for the eastern district of Michigan, continued and held, pursuant to adjournment, at the district court room, in the city of Detroit, on Thursday, the twelfth day of February, in the year one thousand eight hundred and eighty-five.

Present: The Honorable Henry B. Brown, district judge.

THE RICHELIEU & ONTARIO NAVIGATION COMPANY
vs.
THE BOSTON MARINE INSURANCE COMPANY.

In this cause the jurors heretofore impaneled and sworn come into court again and sit together and hear further evidence in the case.

At a session of the circuit court of the United States for the eastern district of Michigan, continued and held, pursuant to adjournment, at the district court room, in the city of Detroit, on Friday, the thirteenth day of February, in the year one thousand eight hundred and eighty-five.

Present: The Honorable Henry B. Brown, district judge.

THE RICHELIEU & ONTARIO NAVIGATION COMPANY
vs.
THE BOSTON MARINE INSURANCE COMPANY.

In this cause the jurors heretofore impaneled and sworn come into court again and sit together and hear further evidence in the case.

At a session of the circuit court of the United States for the eastern district of Michigan, continued and held, pursuant to adjournment, at the district court room, in the city of Detroit, on Saturday, the fourteenth day of February, in the year one thousand eight hundred and eighty-five.

Present: The Honorable Henry B. Brown, district judge.

THE RICHELIEU & ONTARIO NAVIGATION COMPANY
vs.
THE BOSTON MARINE INSURANCE COMPANY.

In this cause the jurors heretofore impaneled and sworn come into court again and sit together and hear the arguments of counsel in part.

28 *Verdict.*

At a session of the circuit court of the United States for the eastern district of Michigan, continued and held, pursuant to adjournment, at the district court room, in the city of Detroit, on Monday, the sixteenth day of February, in the year one thousand eight hundred and eighty-five.

Present: The Honorable Henry B. Brown, district judge.

THE RICHELIEU & ONTARIO NAVIGATION COMPANY
vs.
THE BOSTON MARINE INSURANCE COMPANY.

In this cause the jurors heretofore impaneled and sworn come into court again and sit together and after hearing the conclusion of the arguments of counsel and the charge of the court retire under the charge of an officer of the court, duly sworn for that purpose, to consider of their verdict to be given, and after being absent for a time return into court and say upon their oath that the said defendant did not undertake or promise in manner and form and [as] the said plaintiff hath in its declaration in this cause complained against it.

At a session of the circuit court of the United States for the eastern district of Michigan, continued and held, pursuant to adjournment, at the district court room, in the city of Detroit, on Tuesday, the seventeenth day of February, in the year one thousand eight hundred and eighty-five.

Present: The Honorable Henry B. Brown, district judge.

THE RICHELIEU & ONTARIO NAVIGATION COMPANY
vs.
THE BOSTON MARINE INSURANCE COMPANY.

In this cause, on motion of Moore & Canfield, attorneys for plaintiff, the time to move for a new trial is extended twenty days.

And on like motion it is further ordered that the time to settle a bill of exceptions be, and the same is hereby, extended thirty days after decision of motion for new trial.

29 *Time Extended, &c.*

At a session of the circuit court of the United States for the eastern district of Michigan, continued and held, pursuant to adjournment, at the district court room, in the city of Detroit, on Tuesday, the tenth day of March, in the year one thousand eight hundred and eighty-five.

Present: The Honorable Henry B. Brown, district judge.

THE RICHELIEU & ONTARIO NAVIGATION COMPANY
vs.
BOSTON MARINE INS. CO.

In this cause, on motion of Mr. Canfield, of counsel for plaintiff, it is ordered that the time to move for a new trial be, and the same is hereby, extended ten days.

At a session of the circuit court of the United States for the eastern district of Michigan, continued and held, pursuant to adjournment, at the district court room, in the city of Detroit, on Tuesday, the seventeenth day of March, in the year one thousand eight hundred and eighty-five.

Present: The Honorable Henry B. Brown, district judge.

THE RICHELIEU & ONTARIO NAVIGATION COMPANY
vs.
BOSTON MARINE INS. CO.

On motion of Mr. F. H. Canfield, attorney for plaintiff, it is ordered that the time to move for a new trial be, and the same is hereby, extended ten days.

At a session of the circuit court of the United States for the eastern district of Michigan, continued and held, pursuant to adjournment, at the district court room, in the city of Detroit, on Wednesday, the twenty-third day of September, in the year one thousand eight hundred and eighty-five.

Present: The Honorable Henry B. Brown, district judge.

THE RICHELIEU & ONTARIO NAVIGATION COMPANY
vs.
THE BOSTON MARINE INS. CO.

By consent of counsel this cause is continued for trial until next term.

30 *Motion for New Trial Denied and Judgment Entered.*

At a session of the circuit court of the United States for the eastern district of Michigan, continued and held, pursuant to adjournment, at the district court room, in the city of Detroit, on Wednes-

day, the twenty-eighth day of October, in the year one thousand eight hundred and eighty-five.

Present: The Honorable Henry B. Brown, district judge.

THE RICHELIEU & ONTARIO NAVIGATION COMPANY
vs.
THE BOSTON MARINE INSURANCE COMPANY.

In this cause a motion by the plaintiff for a new trial is argued by counsel for respective parties and submitted.

At a session of the circuit court of the United States for the eastern district of Michigan, continued and held, pursuant to adjournment, at the district court room, in the city of Detroit, on Monday, the eighth day of February, in the year one thousand eight hundred and eighty-six.

Present: The Honorable Henry B. Brown.

THE RICHELIEU & ONTARIO NAVIGATION COMPANY
vs.
THE BOSTON MARINE INSURANCE COMPANY.

In this cause a motion by plaintiff for a new trial having been heretofore argued and submitted and due deliberation having been thereupon had, it is by the court now here ordered that said motion be, and the same is hereby, denied.

And the jury by whom the issue in this cause was tried having rendered a verdict therein in favor of the defendant, now, on motion of Maynard & Swan, attorneys for the defendant, it is by the court now here considered that the said plaintiff take nothing by its suit, and that the defendant do go thereof without day; and it is further considered that the said defendant do recover against the said plaintiff its costs and charges by it about its defense in this behalf expended, to be taxed, and that said defendant have execution therefor.

31 *Opinion of Judge Brown.*

THE RICHELIEU AND ONTARIO NAVIGATION COMPANY
vs.
THE BOSTON MARINE INSURANCE COMPANY.

On motion for new trial.

This was an action upon a policy of insurance, whereby the defendant insured the steamer Spartan in the sum of $10,000 against all losses occasioned by perils of the sea, "excepting all perils, losses, misfortunes, or expenses consequent upon and arising from or caused by the following or other legally-excluded causes, viz., damages that may be done by the vessel hereby insured to any other vessel or property; incompetency of the master or insufficiency of the crew or want of ordinary care and skill in navigating said vessel and in loading, stowing, and securing the cargo of said vessel; rottenness, inherent defects, overloading, and all other unseaworthiness, theft, barratry,

or robbery." At the time of the loss the Spartan was in the service of the Owen Sound Steamship Company, which had chartered her from the plaintiff in this case. The loss occurred June 19, 1883, while the steamer was bound upon her trip from Silver Islet, upon the north shore of Lake Superior, to Owen Sound, Ontario. When she left her port of departure the weather was fair and the steamer took a direct course for Whitefish Point, by way of Passage Island. Midway between Silver Islet and Passage Island a dense fog arose, which continued more or less thick until the time of the stranding. She passed Passage Island in safety, and about 8 o'clock in the evening of the 18th was put upon a course which should have carried her about seventeen miles south of Caribou Island. Her navigation was left in charge of the second mate, Mr. Harbottle, who remained on watch until about half-past 1 o'clock in the morning of June 19th. Capt. McGregor, the master, had retired to his berth about 8 o'clock in the evening, after committing the charge of the vessel to Mr. Harbottle and giving that officer the following written instructions for the navigation of the steamer: "If it continues thick at 10 o'clock p. m. keep her S. E. by E. until 3 a. m., then keep her S. E. by E. ½ E., small, etc.; if it clears continue on your course S. E. by E. ¼ E." The fog continued dense during the second mate's watch and the steamer, under the instructions given, was run at full speed on the prescribed course, which was a quarter of a point more southerly than usual. About half-past 1 o'clock the first mate, Mr. Waggoner, came on watch and relieved Harbottle, the second mate. The vessel was then running at full speed. The weather was thick and the fog dense, and so continued all night. She continued to run, at the rate of about 13 miles an hour, in a fog so dense that "you could
32 not see anything—you could not see the length of the boat," as Waggoner stated it—until about 2.20 a. m., somewhat less than an hour after the change of watch, when she stranded on Caribou Island and brought up about 400 feet from the shore. The weather was still so thick that the land could not be seen. There was no lookout maintained on the steamer and on [no] soundings taken, and the testimony indicated that "if the vessel had been running at half speed she might have been backed off." The defences were that the losses were occasioned (1) by the want of ordinary care in the navigation of the vessel; (2) by her unseaworthiness in running with a defective compass. The jury returned a verdict for the defendant. The plaintiff moved for a new trial upon the grounds stated in the opinion of the court.

F. H. Canfield, for plaintiff; H. H. Swan, for defendant.

BROWN, *J.*:

It is insisted that the court erred—

1. In admitting the protest made by the master and crew after the Spartan had been gotten off and taken to Windsor. The protest was admitted under the following circumstances: Plaintiff put in evidence the proofs of loss served upon the defendant. These proofs recited that "the said vessel, in the prosecution of a voyage, ran ashore on the northeast shore of Caribou Island and became a

wreck and total loss, and was duly abandoned by her owners to the insurers, as will appear by certified copies of the protest of her master and mariners heretofore served on you herewith." We think it clear that in an action on a policy of insurance the protest is not admissible on behalf of the plaintiff. It is true there are several American cases which hold otherwise, but the weight of authority is decidedly the other way. The protest stands in the same position as any other declaration made in the interest of the party offering it. It is not so clear, however, that it may not be put in evidence by the defendant, though the better considered cases hold that it stands in the light of an ordinary admission made by an agent, which is not competent as against the principal unless it be part of the *res gestæ*; but where the protest is served with the proofs of loss and made, in part, the basis of plaintiff's claim against the company, we think he should be held as so far making the statements his own that it should be admitted against him. It is true a contrary ruling was made by the King's bench in Senat *v.* Porter, 7 Term R., 158, but, notwithstanding the positive opinion of Lord Kenyon and his associates, the propriety of this decision may well be questioned. Indeed, we find it difficult to reconcile it with Insurance Co. *v.* Newton, 22 Wall., 33, in which the proofs of loss consisted of affidavits giving the time, place, and circumstances of the insured's death and the record of the finding of the jury upon the coroner's inquest. These were held admissible on behalf of the defendant. While the affidavits showed the fact of death, they also showed that the deceased committed suicide. It was held that, as they were intended for the action of the company, the latter had a right to rely upon their truth, and that, unless corrected for mistake, the insured was bound by them. "Good faith and fair dealing required that the plaintiff should be held to representations deliberately
33 made until it was shown that they were made under misapprehensions of the facts or in ignorance of material matters subsequently ascertained."

The fact that the protest was not attached to the proofs of loss is immaterial, for a paper referred to and described in a written instrument so that it may be identified is thereby made a part of the instrument the same as if it were incorporated with it. *In re* Com'rs Washington Park, 52 N. Y., 131; Tonnele *v.* Hall, 4 N. Y., 140.

The case of Senat *v.* Porter was followed by the same judge in Christian *v.* Coombe, 2 Esp., 490, and is usually cited by the elementary writers upon marine insurance as settling the law upon that subject; but the tendency of the American and some of the more recent English cases is to hold that, wherever a party has offered or made use of the statements of a third person in any legal proceeding as the basis of a claim against another, it may be used as an admission against him. Thus, in Brickell *v.* Hulse, 7 Adol. & E., 454, affidavits of third persons, used by a party on motion before a judge, were held to be admissible in evidence in a subsequent action against the party so using them. The case of Atkins *v.* Elwell, 45 N. Y., 753, was an action brought to recover damages sustained by the plaintiffs by the fraud of the defendant on the sale of a ship to them.

After the purchase the ship was sent by the plaintiffs to San Francisco; but encountering bad weather she put into Rio Janeiro in distress, where a protest was made by the master before the consul. The defendant expressly denied making any representations as to her soundness, and offered in evidence the protest as showing the statements of the master as to the soundness and condition of the ship at the time of the disaster. The court held it to be admissible. "It was a solemn instrument," said the court, "made by their agent for their benefit in the course of his duty. It was used by them in a matter of importance to them and others. It was used by them upon a question which was at issue in the action then upon trial, viz., the condition of a vessel at a time at which they in this action allege that she was unsound. How much weight should be given to it is not the point here. Whatever weight it had the defendants were entitled to, as its statements adopted by the plaintiffs and used by them for their benefit in one instance could not be repudiated by them in another." See, also, 1 Phil. Ev., 449; Patapsco Ins. Co. *v.* Southgate, 5 Pet., 622; in Marine Ins. Co. *v.* Stras, 1 Munf., 408; Patterson *v.* Insurance Co., 3 Har. & J., 71; and Doherty *v.* Farris, 2 Yerg., 73. The protest was offered by the plaintiff, and of course was ruled out.

In the view we have taken of this question, the fact that the master was not the servant of the plaintiff but of the Owen Sound Steamship Company becomes immaterial, since the plaintiff, by making the protest a part of the proofs of loss, has adopted and made it its own. It is not admitted at all upon the principle of agency.

2. The fact that the words "fogs and defective compass" are not contained in the written part of the protest setting forth the facts of the disaster, but are interlined in the printed part, does not
34 affect the admissibility of the protest; but we think it meets the objection made to the statements of the master at the time the protest was made. The witness Waggoner, in answer to the question whether at the time the protest was made the attention of the master was called to the fact that the compass was defective, was permitted to answer that the master said that the compass was "a little out," and that he laid the disaster solely to the compass. This testimony was objected to upon the same ground as the protest, viz., that it was the admission of an agent after the event and not a part of the *res gestæ*, and that it was not admissible to contradict the testimony of Capt. McGregor, because his attention had not been called to it upon cross-examination, but we think it was competent, in connection with the fact of making the protest, to show that the attention of the master was called to the subject of the defective compass, and that the words "fogs and defective compass" were inserted in the protest with his knowledge. The statements were made in giving instructions to the notary with respect to the protest, which was in itself an official act and strictly within the line of the master's duty, and hence these statements do not fall within the ruling in Packet Co. *v.* Clough, 20 Wall., 528, or Insurance Co. *v.* Mahone, 21 Wall., 152, and the numerous other cases wherein admissions made after the event and not in connection

with the performance of any official act were excluded. We think the admissibility of this testimony is rather controlled by the cases of Kirkstall Brewery Co. *v.* Furness R'y Co., L. R., 9 Q. B., 468; Railroad Co. *v.* Butman, 22 Kan., 639; Xenia Bank *v.* Stewart, 114 U. S., 224; S. C., 5 Sup. Ct. Rep., 845; Morse *v.* Connecticut R. Co., 6 Gray, 450; Dowdall *v.* Pennsylvania R. Co., 13 Blatchf., 403. In all these cases the statements related to a past transaction, but they were made in connection with an act itself within the scope of the agent's duty, and were admitted upon that ground. In this case the admission is no broader than the statement of the master upon the stand that he could account for the loss in no other way, but it shows that his attention was directed to that feature of the case at the time the protest was made, and that it was not inserted by the notary upon his own motion. Indeed, he testified that he had the words inserted himself. Under these circumstances it is difficult to see how the plaintiff was prejudiced by its admission. If we suppose it to have been ruled out the testimony of the master as to the defective condition of the compass would still remain, and the general purport of the evidence would be the same, even if the testimony were technically incompetent. The plaintiff suffered no injury by its admission, and has therefore no legal cause for complaint. Cooper *v.* Coates, 21 Wall., 105; Allen *v.* Blunt, 2 Wood & M., 128.

3. Objection was also made to the admission of the Canadian statute requiring moderate speed in a fog upon the ground that it was intended to apply only to cases of collision, and also because the statutes of Canada are not enforceable in this court. The objection is without force. The act is entitled "An act to make better provision respecting the navigation of Canadian waters," and while it is intended primarily to lay down certain regulations for the prevention of collisions the provisions of the act are general and require the observance of the regulations under all circumstances. We are cited to no authority that acts of this description, and they are universal in all maritime countries, are limited in their application. In the case of Kestrel *v.* Asp, 435, the act was treated as obligatory in a proceeding to suspend the certificate of the master of a vessel for his negligence in permitting her to be stranded. The Spartan was a Canadian vessel and was navigating Canadian waters between two Canadian ports, and was bound to comply with the laws of Canada, and the insurers must be held to have contemplated this requirement in issuing the policy. 1 Phil. Ins., Dec., 736; Peters *v.* Warren Ins. Co., 14 Pet., 99, 112. So far, however, as the question of speed is concerned the point is hardly worth discussing, as the Canadian statute is the same as our own upon the subject. Indeed, these rules of navigation are now recognized as general laws of the sea and constituting a kind of international code. The Scotia, 14 Wall., 171.

4. It is further claimed that the court erred in charging the jury that, "as the Spartan was violating the statute laws of Canada in running at full speed in a dense fog, plaintiff must show affirmatively that neither the speed of the steamer nor the defects of the

compass could have caused or contributed to the stranding of the steamer, and that the burden of proving a loss of this kind is upon the plaintiff. There is no presumption that the loss was caused by a peril insured against by the defendant." This charge is claimed to have been erroneous because it puts the burden of proof upon the wrong party. There is no doubt of the correctness of the general proposition that, in the absence of a specific stipulation in the policy, the insurer is liable for losses resulting from negligence not amounting to barratry. 1 Pars. Ins., 534, note; Waters *v.* Merchants' Louisville Ins. Co., 11 Pet., 213; National Ins. Co. *v.* Webster, 83 Ill., 470; Fireman's Ins. Co. *v.* Powell, 13 B. Mon., 311; Citizens' Ins. Co. *v.* Marsh, 41 Pa. St., 386; Busk *v.* Royal Exch. Assur. Co., 2 Barn. & Ald., 73; Walker *v.* Maitland, 5 Barn. & Ald., 171; Bishop *v.* Pentland, 7 Barn. & C., 219.

In the American cases it is broadly held that the underwriters are liable for losses occasioned by negligence; in the English cases it is discussed in a somewhat misleading manner as a question of remote and proximate cause, as if the insurer would not be liable if the negligence were the immediate cause of the loss; but we find no case holding directly that he would not be so liable. The true distinction seems to have been between cases of accidental or negligent stranding and those wherein the stranding was one of the ordinary and expected incidents of the voyage. Hearne *v.* Edmunds, 1 Brod. & B., 388; Bishop *v.* Pentland, 7 Barn. & C., 219; Rayner *v.* Godmond, 5 Barn. & Ald., 225. In the latter class the insurers would not be liable.

In this case, however, there is an express exception of all perils and losses occasioned by the want of ordinary care and skill in navigation and all unseaworthiness. In this connection we understand it to be the law that the violation of a statutory obligation or a proved neglect to conform to the requirements of good seamanship followed by a disaster raises the presumption that such neglect contributed to it. This has been reiterated so many times in collision cases as to have become elementary. Lownd. Col., 88; the Genesee Chief, 12 How., 447–463; the De Soto, 5 How., 465; the Pennsylvania, 19 Wall., 136; the Fenham, L. R. 3 P. C., 212; the Lion, 1 Spr., 44, 40; the Northern Indiana, 3 Blatchf., 92–106; the Leo, 11 Blatchf., 225; the Voorwarts & Khedive, 5 App. Cas., 894–900. In Taylor *v.* Harwood, Taney, 437–444, the Chief Justice stated, in general terms, that "the omission of a known legal duty is such strong evidence of negligence and carelessness that in every case of collision happening under such circumstances I should hold the offending vessel as altogether at fault, unless clear and indisputable evidence established the contrary." We understand this principle to be of general application in all actions where the question of negligence is involved. Shear & R., Neg., 484. In Jetter *v.* New York & H. R. R., 2 Keys, 154, a charge that a street car proceeding at a rate forbidden by the city ordinances would render the company liable, because in such case the accident would be the result of their violating the city ordinances, was held to be proper, notwithstanding the decision to the contrary in Brown

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v. Buffalo & S. L. R. R., 22 N. Y., 191, relied upon by the plaintiff here. See, also, Massoth *v.* Delaware & H. C. Co., 64 N. Y., 524; Langhoff *v.* Milwaukee R. Co., 19 Wis., 489; Hayes *v.* Michigan Cent. R. Co., 111 U. S., 228; S. C., 4 Sup. Ct. Rep., 369. All the authorities are reviewed in an elaborate opinion in Grey's Ex'r *v.* Mobile Trade Co., 55 Ala., 387, and the case of Brown *v.* Railroad Co., 22 N. Y., 191, distinctly repudiated.

The seventh section of the Canadian statute, already referred to, provides expressly that in case of any damage to person or property arising from the non-observance by any vessel or raft of any of the rules prescribed in the act, "such damage shall be deemed to have been occasioned by the willful default of the person in charge of such raft or of the deck of such vessel at the time, unless the contrary be proven or it be shown to the satisfaction of the court that the circumstances of the case rendered a departure from the rules necessary."

It is claimed, however, that this rule, enforced so often in cases of collision and in actions for negligence against carriers, should be applied in actions upon policies of insurance, for the reason that the carrier is not exempted if his negligence contributes to the loss, notwithstanding the loss itself may be occasioned by a peril of the sea, while the insurer is liable wherever a peril of the sea contributes to the loss, though the ship may have been placed in such peril by the negligence of the insured. If this were true as a universal proposition the exception in the policy of perils and losses consequent upon and arising from or caused by want of ordinary care and skill would be of little or no avail, for, no matter how gross the negligence or how direct the loss consequent thereon, if a peril of the sea intervened to produce the disaster the company would be liable. The exception is not only of all "losses and misfortunes," but of all "perils" caused by negligence. The inference from this is that the company would be exonerated, notwithstanding the immediate loss be by a peril of the sea. If such peril arose from negligence
37 or unseaworthiness it is not intended, in this connection, to impugn the authority of the numerous cases which hold that where the negligent act has ceased to operate at the moment of the disaster such disaster shall be referred to the peril rather than to the negligence. Examples of such are Morrison *v.* Davis, 20 Pa. St., 171; Denny *v.* New York Cent. R. Co., 13 Gray, 481; Daniels *v.* Ballantine, 23 Ohio St., 532; Railroad Co. *v.* Reeves, 10 Wall., 176; Souter *v.* Baymore, 7 Pa. St., 415. But where the negligent act continues to be operative up to the very instant of the loss, we find it difficult to escape the conclusion that it is a "peril" caused by negligence, and by negligence alone, even if the loss itself were to be attributed to the peril rather than to negligence.

The case of Waters *v.* Merchants' Louisville Ins. Co., 11 Pet., 213, is a leading case upon the question of proximate and remote cause. The policy was general, containing no exception of this kind, and the court held the company not liable for barratry, though liable for negligence, and that a loss by fire, intentionally set by the master and the crew, was a loss by barratry. "Such a loss," says Mr. Justice

Story, "is a peril and loss attributable to the barratry as its proximate cause, as it concurs, as the efficient agent, with the element *eo instanti* when the injury is produced. If the master or the crew should barratrously bore holes in the bottom of the vessel, and the latter should thereby be filled with water and sink, the loss would properly be deemed a loss by barratry, and not by a peril of the sea or rivers, though the flow of the water should co-operate in producing the sinking." This language appears to be somewhat in conflict with that used by the English courts, with respect to proximate and remote cause, in Busk *v.* Royal Exch. Assur. Co., 2 Barn. & Ald., 73; Walker *v.* Maitland, 5 Barn. & Ald., 171, and Bishop *v.* Pentland, 7 Barn. & C., 219. In the subsequent case of Insurance Co. *v.* Transportation Co., 12 Wall., 194, 199, it is said that "when one of several successive causes is sufficient to produce the effect—for example, to cause a loss—the law will never regard an antecedent cause of that cause or the *causa causans*. In such a case there is no doubt which cause is the proximate one, within the meaning of the maxim. But when there is no order of succession in time, when there are two concurrent causes of loss, the predominating efficient one must be regarded as the proximate when the damage done by each cannot be distinguished."

It is only within a comparatively few years that the cause exempting the underwriter from the consequences of negligences has been introduced into marine policies, and hence cases involving the construction of this clause are not numerous; but we take it that wherever, under the ordinary form of a policy, the insurer would be exonerated from the consequences of a peril occasioned by barratry, he would, under this clause, escape liability if the peril were occasioned by the negligence of the master and crew, and that this is a question for the jury in each case. Milwaukee R'y Co. *v.* Kellogg, 94 U. S., 469. This appears to have been the construction given to a similar provision by Mr. Justice Woods in Levi *v.* New Orleans Ins. Ass'n, 2 Woods, 63, which was an action upon a policy
38 to recover a loss resulting from a collision occasioned by the negligence of the pilot of the insured vessel. The fault committed by the vessel was in the non-observance of a rule or custom of the river that ascending boats should run under the points near the shore, so as to avoid the current, while descending boats followed the main channel of the river, so as to take advantage of the current. The policy provided that the boats should be navigated "free from any loss or damage by barratry, or by the negligence of those in charge of the boat, at or before the time of any accident or disaster;" and it was held that as there was negligence in the management of the insured vessel at the time of the collision there could be no recovery. See, also, St. John *v.* American Mut. Ins. Co., 11 N. Y., 519; Lund *v.* Tyngsboro, 11 Cush., 563; Butler *v.* Wildman, 3 Barn. & Ald., 398.

In Thompson *v.* Hopper, 6 El. & Bl. 937, which was an action upon a time policy, it appeared the plaintiff sent the ship to sea in an unseaworthy state, and caused her to anchor in the offing in that state. While there she was caught in a storm and driven

ashore. There was evidence from which the jury might have drawn the conclusion that, although the unseaworthiness was not the immediate cause of loss, the loss would not have occurred if the ship had been seaworthy when she went to sea. It was held that the defense was made out if the misconduct of the plaintiff occasioned the loss, though it was not its immediate cause. In delivering the judgment, Lord Campbell observed:

"Is it to be said, then, that, to exempt the assurers from liability, the misconduct of the assured must be the direct and proximate cause of the loss? We think that for this purpose the misconduct need not be the *causa causans*, but that the assured cannot recover if their conduct was *causa sine qua non*. In that case they have brought the misfortune upon themselves by their own misconduct, and they ought not to — indemnified. The very object of insurance is to indemnify against fortuitous losses which may occur to men who conduct themselves with honesty and with ordinary prudence. If the misconduct is the efficient cause of loss, the insurers are not liable."

In Ionides *v.* Universal M. Ins. Co., 14 C. B., N. S., 279, a policy of insurance on a ship-load of coffee contained the words: "Free of capture, seizure, and detention, and all the consequences thereof and of any attempt thereat, and free from all consequences of hostilities, riots, and commotions." The ship was wrecked on Cape Hatteras, where there was a lighthouse, the light of which, however, had been extinguished by the Confederates. A large portion of the cargo might have been saved had not the Confederates prevented it. It was held that there was a total loss, by perils of the sea, of that portion of the cargo which could not have been saved, notwithstanding the hostile extinguishment of the light, but that the loss of that part which might have been saved but for the interference of the Confederates was a consequence of hostilities within the exception of the policy, and therefore, as to that portion, the insurers were not liable. The case is a very instructive one upon the subject of proximate and remote cause, and apparently is in full accord with that of the Supreme Court in the case of Waters *v.* Merchants' Louisville Ins. Co., 11 Pet., 213.

39 We see nothing inconsistent with these cases in the subsequent ones of Dudgeon *v.* Pembroke, 1 Q. B. Div., 96; S. C., 2 App. Cas., 284, and West India, etc., Co. *v.* Home, etc., Ins. Co., 6 Q. B. Div., 51: nor are we much impressed with the distinction drawn in one or two cases between actions upon bills of lading and upon policies of insurance, with respect to the liability of the defendant for losses occasioned by a peril of the sea. This distinction seems to be repudiated in the case of the Portsmouth, 9 Wall., 684, and, even if sound, is without force in the construction of the policy in this case. Few of the English cases are of any value, as their policies do not seem to contain the proviso exempting the underwriter from perils and losses occasioned by negligence and unseaworthiness.

We have found it impossible to reconcile our views as to the proper construction of this policy with the opinion of the Illinois

court of appeals in Greenwich Ins. Co. *v.* Raab, 11 Bradw., 636, in which it was held, under a policy of this description, that the underwriter was liable notwithstanding the loss was produced by the want of care in the navigation of the vessel. The cases of the National Ins. Co. *v.* Webster, 83 Ill., 470, and the others cited in support of this conclusion, are not controlling, as the policies in none of them contained this provision. We think the learned court was misled by the language of the early English cases.

We have no criticism to make of Western Ins. Co. *v.* Cropper, 32 Pa. St., 351, and Commonwealth Ins. Co. *v.* Cropper, 21 Md., 311, as the question in each case was as to the extent of the liability of the company under what was known as the "steamboat clause." The opinions throw no light upon the present controversy.

Upon the whole, we have come to the conclusion that there was no error in the construction complained of. If there be any significance at all to the exception of perils and losses caused by negligence or unseaworthiness, they surely ought to suffice for the exoneration of the underwriter in a case where a steamer, equipped with a compass known to be defective, is driven in a dense fog with unabated speed and in direct violation of a local statute upon an island lying but eight miles off her usual track. To say that, under such circumstances, the negligence or unseaworthiness was not the proximate or efficient cause of the peril or loss seems to us a distinction too subtile and refined for the ordinary apprehension. It is difficult to conceive of a loss by negligence or unseaworthiness unconnected with a sea peril; but under this policy, if the peril be so produced, the subsequent loss is within the exception. The question as to the cause of the loss was fairly left to the jury, and we see no reason to differ from their finding.

5. That the court erred in charging the jury that "if there were any defects in the compass, known or unknown, rendering it unsafe or unsuitable for use in Lake Superior, and the stranding of the vessel was caused by or consequent upon or arose from such defects in the compass, the vessel was not seaworthy for Lake Superior navigation, whatever her fitness for navigation elsewhere, and the plaintiff cannot recover." It may be assumed that there is no implied warranty of seaworthiness in a time policy, and the mere fact that the vessel was unseaworthy would not preclude a recovery in case of a loss unconnected with the defect; but the policy contains an express exception of liability for losses occasioned by this cause, and whether it was known or unknown would be immaterial. The exception amounts to a warranty that the loss shall not be caused by unseaworthiness, and the ignorance of the owner of the defect in the compass would not affect his right to recover. The Glenfruin, 5 Asp., 413; Work *v.* Leathers, 97 U. S., 379; 1 Pars. Ins., 337–368.

This covers all the points made in the briefs of counsel. The motion for a new trial must be denied, and judgment will be entered upon the verdict.

41 *Time to Settle Bill of Exceptions Extended.*

At a session of the circuit court of the United States for the eastern district of Michigan, continued and held, pursuant to adjournment, at the district court room, in the city of Detroit, on Thursday the twenty-fifth day of February, in the year one thousand eight hundred and eighty-six.

Present: The Honorable Henry B. Brown, district judge.

THE RICHELIEU & ONTARIO NAVIGATION COMPANY
vs.
THE BOSTON MARINE INS. CO.

In this cause, on motion of F. H. Canfield, of counsel for the plaintiff, it is ordered that the time to settle a bill of exceptions be, and the same is hereby, extended thirty days.

At a session of the circuit court of the United States for the eastern district of Michigan, continued and held, pursuant to adjournment, at the district court room, in the city of Detroit, on Tuesday, the twenty-third day of March, in the year one thousand eight hundred and eighty-six.

Present: The Honorable Henry B. Brown, district judge.

THE RICHELIEU & ONTARIO NAVIGATION COMPANY
vs.
THE BOSTON MARINE INSURANCE COMPANY.

On motion of Mr. F. H. Canfield, of counsel for the plaintiff, it is ordered that the time to settle a bill of exceptions be, and the same is hereby, extended thirty days.

42 *Stipulation to Extend Time.*

Circuit Court of the United States for the Eastern District of Michigan.

THE RICHELIEU AND ONTARIO NAVIGATION COMPANY
vs.
THE BOSTON MARINE INSURANCE COMPANY.

It is hereby stipulated that the time for settling a bill of exceptions in this case may be extended for sixty days from the date of this stipulation, and that an order to this effect may be entered in said cause.

April 30th, 1886.

MOORE & CANFIELD,
Pl'f's Att'ys.
MAYNARD & SWAN,
Att'ys for Def't.

Endorsed: 7137. United States circuit c't, east. dist. of Mich. Richelieu & Ontario Navigation Co. *vs.* Boston Marine Insurance Co. Stipulation to extend time to take bill of exception. Filed May 1, 1886. Walter S. Harsha, clerk.

43 *Time to Settle Bill of Exceptions Extended.*

At a session of the circuit court of the United States for the eastern district of Michigan, continued and held, pursuant to adjournment, at the district court room, in the city of Detroit, on Saturday, the first day of May, in the year one thousand eight hundred and eighty-six.

Present: The Honorable Henry B. Brown, district judge.

THE RICHELIEU & ONTARIO NAVIGATION COMPANY
vs.
THE BOSTON MARINE INSURANCE COMPANY.

In this cause, on reading and filing stipulation signed by attorneys for the respective parties, and on motion of Moore & Canfield, attorneys for the plaintiff, it is ordered that the time to settle a bill of exceptions be, and the same is hereby, extended sixty days from April 30th.

At a session of the circuit court of the United States for the eastern district of Michigan, continued and held, pursuant to adjournment, at the district court room, in the city of Detroit, on Wednesday, the twenty-third day of June, in the year one thousand eight hundred and eighty-six.

Present: The Honorable Henry B. Brown, district judge.

THE RICHELIEU & ONTARIO NAVIGATION COMPANY
vs.
THE BOSTON MARINE INSURANCE COMPANY.

In this cause, on motion of Moore & Canfield, attorneys for the plaintiff, it is ordered that the time to settle a bill of exceptions be, and the same is hereby, extended until Sept. 15.

At a session of the circuit court of the United States for the eastern district of Michigan, continued and held, pursuant to adjournment, at the district court room, in the city of Detroit, on Wednesday, the fifteenth day of September, in the year one thousand eight hundred and eighty-six.

Present: The Honorable Henry B. Brown, district judge.

THE RICHELIEU & ONTARIO NAVIGATION COMPANY
vs.
THE BOSTON MARINE INSURANCE COMPANY.

In this cause, by consent, the time to settle a bill of exceptions is hereby extended ten days.

44 *Time to Settle Bill of Exceptions Extended.*

At a session of the circuit court of the United States for the eastern district of Michigan, continued and held, pursuant to adjournment, at the district court room, in the city of Detroit, on Saturday, the twenty-fifth day of September, in the year one thousand eight hundred and eighty-six.

Present: The Honorable Henry B. Brown, district judge.

THE RICHELIEU & ONTARIO NAVIGATION COMPANY
vs.
THE BOSTON MARINE INS. CO.

On motion of Mr. F. H. Canfield, attorney for plaintiff, the time to settle a bill of exceptions is hereby extended ten days.

At a session of the circuit court of the United States for the eastern district of Michigan, continued and held, pursuant to adjournment, at the district court room, in the city of Detroit, on Tuesday, the fifth day of October, in the year one thousand eight hundred and eighty-six.

Present: The Honorable Henry B. Brown, district judge.

THE RICHELIEU & ONTARIO NAVIGATION COMPANY
vs.
THE BOSTON MARINE INS. CO.

By consent, the time to settle a bill of exceptions in this cause is hereby extended until the further order of the court.

45 Circuit Court of the United States for the Eastern District of Michigan.

THE RICHELIEU AND ONTARIO NAVIGATION COMPANY
vs.
THE BOSTON MARINE INSURANCE COMPANY.

Bill of Exceptions.

At a session of said court held in the city of Detroit, in said district, on the 10th day of February, 1885, the issue joined in the above-entitled cause came on to be tried before the Honorable Henry B. Brown, district judge, and a jury of said district duly empaneled and sworn for that purpose, and the plaintiff, to maintain the issue on its part, offered in evidence a certain policy of insurance issued by the defendant, a copy of which is hereto annexed and marked "Exhibit A;" also proofs of loss served on defendant's agents, of which Exhibit "B" hereto annexed is a copy. Similar proofs were also served on all the other underwriters on said steamer, viz., the Continental Insurance Company of New York, the Union Insurance Company of Philadelphia, the Insurance Company of the State of Pennsylvania, and the Thames & Mersey Marine Insurance Company.

The plaintiff also called Alexander McGregor as a witness, who testified that he was the master of the steamer "Spartan;" that he had sailed upwards of forty years; that she was a British vessel owned by plaintiff, a Canadian corporation; that the tonnage of the "Spartan" was about 678 tons; that she was a freight and passenger steamer, and at the time of the stranding had 17 passengers aboard.

That on the 19th day of June, 1883, the steamer was on a voyage from Fort William, upon the north shore of Lake Superior, to Owen Sound, Ontario, which was her usual route; that, besides the

46 master, she had two mates, two wheelsmen, two engineers, four firemen, a full complement in the cabin, and four or five deckhands.

That she left Fort William on the morning of June 18th, and while on the voyage was stranded on the southwest point of Caribou Island, in Lake Superior, at about 2 o'clock on the morning of June 19th; that when the steamer got half way between Silver Islet and Passage Island it got to be very thick—foggy—and witness heard the fog-whistle in passing Passage Island; that it was very foggy for all the next day and day afterwards to the middle of the day—very thick; that at the time of the stranding it was the mate's watch; that the wind was nearly after the steamer, blowing fresh, and quite a heavy sea on, and she was running at full speed when she struck.

That the officers and crew of the steamer were unable to get her off, and notice was sent to the owners or charterers of the steamer; that notice of the loss was also communicated to the underwriters, with a request for assistance, and said underwriters sent a wrecking expedition, consisting of the steam-tug "Winslow" with a wrecking outfit, under the command of Captain Swain, to rescue said steamer.

On June 26th a telegraphic notice of abandonment of the steamer as a total loss was sent by the plaintiff to the underwriter, a copy of which telegram is set forth in the charge of the court hereto annexed.

After a considerable labor and time expended said wrecking expedition succeeded in getting the steamer off, and towed her to the port of Detroit, in the State of Michigan, for repairs, and that in effecting the release of the steamer witness and Captain Swain acted in unison.

That she arrived in Detroit on the 9th day of July, where she
47 was put into dry dock immediately to keep her from sinking; that said steamer was an iron vessel and was greatly damaged by reason of her stranding, and on the second day after the steamer arrived at Detroit a survey was held by Mr. Gibson, acting for the underwriters, and by Mr. Kirby, chosen by Captain Patterson, manager of the Owen Sound Steamship Company, to whom said steamer had been chartered by the plaintiff, her owner.

That the repairs were commenced soon after the survey was held. While they were being made Mr. Crosby, one of the general agents of four of the underwriters having risks on the steamer, came to the vessel hurriedly, but gave no particular direction and only to see that there was a strict supervision kept of the repairs.

That the bill for said repairs amounted to about twenty-three or twenty-four thousand dollars; that the bills of the wrecking expedition under the command of Captain Swain for rescuing said steamer and towing her to Detroit amounted to seven thousand four hundred and fifty-five dollars and thirteen cents, and that the same was paid by the underwriters.

Said witness also gave further testimony tending to show that the furniture and outfit of said steamer was greatly damaged by reason of said stranding, and that a portion of her outfit, such as blankets,

mattresses, carpets, lines, &c., were sacrificed in endeavoring to stop the leak occasioned by said stranding.

That besides the aforesaid wrecking bill, which was paid by the underwriters, certain sacrifices were made and other expenses were incurred for wages of officers and crew subsequent to the stranding of said steamer and before her arrival at the port of Detroit and for other assistance employed by said master to rescue the steamer
48 before the arrival of said wrecking expedition, which amounted to the sum of about $1,912.24, and that the entire loss and damage consequent upon said stranding, including salvage expenses and repairs, after deducting one-third new for old on repairs, amounted to about $31,482.26.

Witness further testified that the repairs on said steamer were completed some time in September, 1883; that an adjustment of the loss was made by W. D. Robinson, of Buffalo, a marine adjuster; that witness received the bills or vouchers for the expense of rescuing and repairing said vessel from Crosby & Dimick, general agents of four of the companies having risks upon said steamer, and delivered them to said adjuster, the bills for repairs having been previously delivered to said Crosby & Dimick by witness.

On cross-examination said witness testified that he had sailed the "Spartan" all that season; made a trip every ten days; this was her third trip. We generally ran along the north shore of Lake Superior on her trip from Owen Sound to Port Arthur and return, and that this was her first trip on the course from Passage Island to White Fish Point; that he made a protest after the steamer was gotten off and brought to Detroit, and witness identified the paper hereto annexed and marked Exhibit C as a copy of said protest; that witness retired to his state-room at 8 o'clock in the evening of June 18th, leaving the second mate on watch; that witness just got out of bed as the steamer struck on Caribou, but had not got on deck; that he had very foggy weather that trip, and it did not clear up until some time the next day after the stranding; that when he went to bed he left the second mate in command and gave him the following written instructions:

"MONDAY EVENING.

Mr. HARBOTTLE: If it continues thick at 10 o'clock p. m.
49 keep her S. E. by E. until 3 a. m.; then keep her S. E. by E. ½ E. small. If it clears continue on your course S. E. by E. ¼ E.

"A. M. McGREGOR."

Witness further testified that when he went to bed at 8 o'clock the weather was still very thick, and when he got on deck immediately after the stranding he found it very thick; could not see the land; that the steamer's speed when she stranded was about 12 miles an hour—12 to 12½; that the steamer was running on time, and his instructions were based on that, and witness anticipated and supposed that she would be kept running at full speed; that when he went to bed at 8 o'clock the steamer was considerably this side of Passage Island.

Q. To what do you attribute her stranding?
A. Either to the currents or the defects of the compass.
Q. What was the matter with the compass?
A. Nothing that I know of, or I should not have run her.
Q. It was defective, was it?
A. More or less; it was running in opposite courses.
Q. That was what you stated, was it not—that her compass was defective?
A. Yes, sir; I did.
Q. Do you attribute the loss to any of her officers or crew?
A. No.
Q. When that protest was signed you had those words inserted, did you not—"fogs and defective compass?"
A. Yes, sir.
Q. You think the loss was occasioned by a defective compass or fogs?
A. Yes, sir.
Q. How far would you have passed? I think you have stated that if it had not been for the defective compass you ought to
50 have been 17 miles to the southward of Caribou?
A. I may state here that I did not see any reason to suspect the compass so far as we had run—so far as they took us from Passage Island to Silver Islet.
Q. After you got down here you had new compasses, did you not?
A. Yes, sir.
Q. You have always attributed that loss to the defective compass?
A. Yes, sir, and the current.

Witness further testified that he was hired by the season and his wages as master were $1,100 for the season; that he made claim to the adjuster for $110 for 22 days' wages as master from the stranding until the "Spartan" was brought to Detroit; that he also furnished the adjuster with the claim of $110 for his services going into the hold and stopping leaks, which services were rendered during the 22 days for which witness charged for services as master; that the charges for wages of the crew made in the adjustment exceed the regular wages which the men had been receiving; that the deckhands received but $16 per month.

Q. When at the strand at Caribou you saw Captain Swain when he first came there?
A. I did.
Q. He reported to you for orders, didn't he?
A. No, sir; he came there and at once went to work to put the pumps on her. There was no question of authority or anything of the kind.
Q. You worked together?
A. Yes, sir; he told me it was necessary for us both to work amicably together; that he was sent there to get that boat off.
51 Q. When the vessel was first gotten off did you give any orders as to where she should go?

Q. Had you spoken to Mr. Wagner or Mr. Harbottle about it—about your compass being out?

A. They knew there was a variation.

Q. Had you spoken to them about it?

A. I am not aware that I did.

Q. Had you told them that the compass was untrue?

A. I suppose that there was some local attraction.

Q. About the currents. You said there were currents in that vicinity?

A. Yes, sir; there were.

Q. Between Passage Island and Caribou Island?

A. Between Passage Island and White Fish Point.

Q. That would include the course between Passage Island and Caribou, would it not, Captain McGregor?

A. Yes, sir.

Q. With a northwest wind, which way would the current take the vessel there?

A. It might differ altogether on the west shore; there would not be any current at all with such a wind as we had that night; part of the time the wind was from the northeast—that is, in the afternoon; then it gradually backed around until it came nearly after us.

55 Q. Your instructions were given just about the time you retired?

A. About 8 o'clock, I think.

Q. The wind being right after you, that would create another current at that time?

A. I don't think so.

Q. Practically, therefore, the stranding was due to the compass, was it not, and not to the currents?

A. I do not say that.

Q. If there was no current, what was there to take you out of your course?

A. I cannot account for it.

Q. Must it not be attributed to the compass?

A. Either that or some other cause aboard the vessel.

Q. You mean attraction by the hull of the vessel?

A. Yes, sir.

On redirect examination he further testified that all compasses on Lake Superior vary more or less at different points. There is one place in Nepigon Channel where it would vary a point and three-quarters in three miles; it will turn right around and come back to the same course again. That is due to minerals, to attractions on the shore. The variation differs with the direction or course which the vessel is running.

Q. Whether a vessel going north or south or east and west, whether the direction which she happens to be going affects the variation of the compass?

A. It does on almost all iron vessels.

Q. In running from the north the more across you go the further the variations?

A. In certain places it is. As a general thing, in running due *due* north and south it is nearer alike — it is; it varies differ-
56 ently in different parts of Lake Superior.

Q. You can't tell the extent of the variation?

A. No.

By the COURT:

Q. Captain McGregor, how came you to direct these repairs—under whose directions were you acting?

A. Mr. Gibson told me that there was no necessity for us both being there; that I could look after the work for the interests of all. Captain Crosby came to me a short time after this conversation with Mr. Gibson and told me to keep a strict supervision over the work; that was when he was returning to Buffalo. I received no instructions from any person representing the plaintiff or representing the Owen Sound Steamship Company. I went to the Dry Dock Company office and got them to prepare a statement of the whole thing in a lump; for instance, pine; there are different duties on different items—pine, oak, and iron, and work on the machinery, and labor. A sheet was prepared for me; I went across to the collector of customs at Windsor and he placed the amount of the percentage or duties opposite each article—the amount of duties chargeable against the different articles. I took them with the other papers and accounts, went to Buffalo, and they were submitted with the other documents to Mr. Crosby, and it was afterwards handed back to me, and I took them to Captain Robinson's office, as I understood he was one of the best adjusters in the State.

Witness further testified as follows:

Q. You took this boat from the St. Lawrence; you brought her from there?

57 A. Yes, sir.

Q. You brought her across Lake Ontario?

A. Yes, sir.

Q. Did you at any time on your way up have any trouble with the compass?

A. No.

Q. How much of the time, after you left Owen Sound on your first trip up to the time of the collision, were you troubled with fogs that season?

A. Very much; nearly every trip.

Q. Did you up to the time of this disaster have any trouble in making the Spartan run a good course?

A. No.

Q. Do you recollect coming up on your first trip, I think, when you wanted to stop at Michopocoten?

A. That was the last trip.

Q. From what point did you lay your course for Michopocoten?

A. From Mamainse.

Q. What is the course from there to Michopocoten?

A. From Mamainse to Michopocoten we steered northwest half north.

Q. That brings you opposite what point?

A. Brings us right opposite Quebec harbor, on Michopocoten.

Q. What was the weather going up there?

A. Very foggy; we ran altogether on time.

Q. With this same compass?

A. With this same compass and this same boat.

58 Q. How did that bring you out?

A. Exactly on the place. We had to stop there after we got there; we did not dare proceed; we stopped until daylight. I heard the fog bell right ahead of us.

Q. Did you encounter any fog after you left Michopocoten on your way to Fort William?

A. We went by way of Nepigon; it is about 104 miles. We ran on time altogether and fetched up within a quarter of a mile of the lighthouse.

Q. How was the weather?

A. Very foggy all the time.

Q. What did you depend upon for the navigation of your vessel?

A. The compass entirely.

Q. The same compass?

A. The same compass.

Q. How many compasses did you have on board?

A. Two.

Q. Where was the other one?

A. Generally carried it forward on the deck where I stood myself—forward of the pilot-house—and other times took it in my room.

Q. On your way down, your first point was Silver Island?

A. Yes, sir.

Q. What is the distance from Fort William to Silver Island?

A. From Port Arthur to Silver Island is about 24 miles.

Q. What is the course from Silver Islet to Port Arthur? (Witness refers to memorandum.)

A. We stopped at Silver Islet.

Q. How did the compass carry you?

A. Carried us all right.

59 Q. What was the next point?

A. From Silver Island to Passage Island.

Q. What is the distance?

A. About twenty miles.

Q. Running the usual course, how would you pass that point?

A. About half or three-quarters of a mile to the westward.

Q, How did you pass it this time?

A. We passed it about that distance off. It was thick when we passed it. We could not see the island, but I heard the bell.

Q. Did you pass there at other times in a fog?

A. Not in this boat.

Q. Had you on other boats?

A. Yes, sir; frequently.

Q. Judging from the sound of the bell, state whether you passed at the usual distance.

A. Yes, sir.

Q. From Passage Island what was the next point?

A. From Passage Island we steered for White Fish Point.

Q. And I think you testified yesterday to meeting the Quebec.

A. Yes, sir; we expected to meet her and of course they were blowing their fog whistle and we were blowing ours, and by going on top of the pilot-house we could see her masts just to the eastward of us.

Q. You did leave written instructions to your mate after you went to your room?

A. Yes, sir. I forgot stating before that I was once out of my room on account of the whistle not blowing for a little while and it had cleared up a little, and that was the reason they had not sounded their fog horn.

Q. What time was that?

A. I should think it would be about 9 o'clock—9 or 10.

60 Q. Was the fog whistle sounded?

A. Yes, sir; I told him to keep sounding it.

Q. And so far as you know it did?

A. It did.

Q. These sailing directions which you gave—I wish to ask you whether there is anything in your directions which made the rate of speed to be kept up by the officer in command obligatory; whether there is anything in those orders obligatory as to the rate of speed (handing a paper to witness)?

Objected to.

COURT: That shows for itself.

Q. Then I will modify the question in this respect. According to the rules and custom of navigating that vessel was there anything obligatory upon the mate, after he had assumed charge of the deck, to maintain any particular rate of speed?

Objected to.

A. Nothing whatever.

Q. What is the distance from Passage Island to Caribou?

A. About 132 miles.

Mr. CANFIELD: I wish to call your attention to this matter of painting. Did you go to Hinchman's store?

A. Yes, sir; I went there.

Q. With whom?

A. With Mr. McLean, the painter.

Q. Who was McLean?

A. He was a painter working in town with another person of the name of Pell.

Q. They were at work on the Spartan?

A. McLean ordered the paints, but they would not let them come unless some person else went there to see it was all right.

61 Q. You went there for that purpose?

A. I went there for that purpose.

Q. Had you any conversation with anybody else respecting this painting—anybody in any way connected with the repairs of the boat?

Objected to as immaterial and incompetent.

Mr. CANFIELD: I want to show this question of painting came up and this Mr. Gibson, of whom we have heard so much and seen so little, had a conversation with Captain McGregor in regard to the work. Now, I wish to show what McGregor did and the circumstances relating to it.

(Objected to as being a part of the plaintiff's main case and for the further reason that Gibson has not been shown to have any connection with the defendant by which the defendant can be held amenable for his acts.

COURT: I don't think any authority is shown on the part of Gibson to bind the company.

Exception for plaintiff.

Q. State whether your attention was called to the Hinchman bill enough this morning to enable you to state whether that is the bill.

A. It is included in this $590.

Q. That was the painting done on the Spartan?

A. Yes, sir.

Recross-examination:

Q. How was the weather on that trip that you went up of which Mr. Canfield inquired of you?

A. It was very thick.

Q. From where?

A. From Mamainse to Nepigon Bay.

62 Q. You went by the north shore, did you?

A. Yes, sir.

Q. Made frequent stops?

A. No, sir; didn't make stops from Michopocoton Island until we got near the lighthouse.

Q. Where was it you came near running on the rocks?

A. She overran her time.

Q. You said in your protest that on the course the vessel steered she would have passed 17 miles to the southward of Caribou Island?

A. I thought so.

Q. Running on her course up would *it* be no test of the correctness of her compass on the way down, would it?

A. When we left I could see Silver Island, and it enabled me to put her on her course, and that course was correct.

Q. No; but I say running on a course up, as you went up that trip, would be no test of the correctness of the compass on the down course?

A. I don't know that it would.

Q. I understood you to say so when you were on the stand first.

A. There might be a little variation.

Q. The variation of half a point in the compass——

A. There is no such variation of hers. My notes between every place and the times and courses and the——

Q. (Interrupting.) A variation of half a point of the compass—where would that bring you from Passage Island to Caribou?

A. Bring us pretty close on to the island.

Q. Then there was a variation to that extent if you struck the island, wasn't there?

A. No; that don't follow.

63 Q. Didn't you so testify?

A. The current may have done it.

Q. You testified there was no current.

A. We could not tell.

Q. You said there was no current with a northwest wind.

A. If I did that would not make it so.

Q. What compass did you run by?

A. The same compass.

Q. Who was on watch?

A. Both on watch a part of the time.

Mr. CANFIELD: Who do you mean by both?

A. Both officers.

Q. The master and mate?

A. The master and mate and second mate after.

Q. Your other trips were on the north shore?

A. There was only one other; this was the first trip down through from Passage Island to Caribou.

Redirect:

Q. The other down were what?

A. From Passage Island to Michopocoten Island.

COURT: How long had you been using this compass?

A. All the time from the time she came out; we started from La Chine on the 14th of May.

Mr. SWAN: This was the third trip?

A. Yes, sir.

COURT: Did you discover any difference in the compass on former trips?

A. A little difference from some other vessels. For instance, the Chicora was very much different.

Q. Had you discovered the compass was defective?

64 A. No; I don't know now it is defective; I could not account for getting ashore there in any other way only by the current or on account of being badly steered.

Mr. SWAN: What trip was it you found the compass out?

A. That was in the other channel. Every vessel I was on varied there in the same place.

Q. But of course a compass on an iron vessel varies more?

A. I say it don't make any difference. The compass will swing from a point to a point and three-quarters in the same spot in passing Flower Isle.

Mr. CANFIELD: Does it make any difference at that point whether the vessel is wood or iron?

A. No, sir; it don't make any difference; I have tested it—the Cumberland, the Chicora, the Frances Smith, and this boat.

Q. Did you leave Passage Island at the usual time?

A. Two o'clock, I think. She was one hour and forty-five minutes running from Silver Island to Passage Island.

Recross:

Q. Didn't you, in your examination-in-chief, testify this way: When you were asked what you supposed the cause of the loss was, you said, "I think the loss was occasioned by the defective compass?"

A. I don't think so.

Q. I have the minutes of the reporter here.

A. It was a mistake if I did. I merely gave it as a supposition that such was the case.

Plaintiff then called as a witness Thomas G. Crosby, who testified that he was a member of the firm of Crosby & Dimick, insurance agents, at Buffalo; that he knew of the stranding of the Spartan, and sent the tug Winslow, under command of Captain Swain, to her relief in the interests of all parties; that on March 24th,
65 1884, after the steamer was repaired, he was called upon to pay the loss, and the objections that he made to the payment were the loss had not been properly adjusted; that we would not pay duties, and that there was other work not specified in the survey that had been done. For these reasons we objected to pay the loss. Witness further testified that Mr. Gibson was sent by the insurers from Buffalo to hold a survey on the steamer before she was repaired.

On cross-examination said witness testified that at the time he was called upon to pay the loss witness had no knowledge of the facts of the loss of the Spartan, except what was stated in the protest, of which he had a copy.

Plaintiff's counsel also called John C. Parker as witness, who, among other things, testified that he was the superintendent of the Detroit Dry Dock Company, by whom the steamer Spartan was repaired; that the dry dock was engaged by Captain McGregor, who had something to do with ordering the repairs.

Q. Who else had to do with the repairs?

A. Mr. Gibson.

On motion of defendant, all the testimony respecting the acts & statements of said Gibson was stricken out & withdrawn from the jury as incompetent; to which ruling plaintiff duly excepted.

On cross-examination the witness testified that Mr. Elliott and Mr. Megann, representing the Owen Sound Steamship Co., ordered the gates put in the bulkhead of the Spartan, but these and three brass deck plates were not necessary to repair the damages suffered by the stranding; that the cost of said gates and plates was $40.00.

Alexander Milloy, the manager of the Richelieu & Ontario Navigation Co., was then called as a witness by plaintiff's counsel and

testified that the plaintiff gave no directions whatever in respect to the repairs made necessary by the disaster.

The plaintiff also called Captain Francis Patterson, manager of the Owen Sound Steamship Co., who testified that he had
66 sailed as master for about thirty years on all the lakes, but had never navigated Lake Superior; had used every kind of compass, and knew the "Spartan" compass; that she was fitted out by plaintiff. After she came to his line he controlled the management of her; that he steered the steamer himself by that compass on her up trip from Owen Sound as far as Lonely Island and during a dense fog; that no difficulty was experienced with the compass. During the time the course of the vessel was changed three times, and she was run entirely by the compass; had no trouble in navigating the vessel through the dense fog on account of that compass. I did not see any objection to the compass any more than other compasses I have used for years on other vessels. All that I could find was that the compass was a little dull—a little slow in its movements.

Q. What is the custom of Canadian vessels about carrying a look-out forward?

Objected to; objection sustained and question excluded, and plaintiff excepted.

He also testified that he gave no directions about any repairs to be made to the Spartan at Detroit, and did not know of any one representing his company giving any such directions; that the Spartan was chartered by plaintiff to the Owen Sound Steamship Company in May, 1883, and at the time of the stranding was being run under said charter, and that witness, as manager of said company, controlled her.

Cross-examination:

Q. You ran her by courses, did you?
A. By courses.
Q. Assisted by what?
A. By my recollection of the courses, I steered——
Q. You also used a book of courses, did you not?
A. Which book of courses?
Q. A book giving the variations of the compass.
A. No, sir.
67 Q. Did you use that?
A. No, sir; I told you before I left Owen Sound I put her on the course to Lonely Island.
Q. How far is that, Captain?
A. That is about 18 or 19 miles from Owen Sound. This is before the fog closed down. I saw that her course there was very nearly the course that I had the year previous with the Africa. About half an hour or three-quarters of an hour after the fog closed down and I could not see anything. I went up the cross-trees and saw the tops of the trees over the fog, and I judged the position

of the boat at that time would take her just exactly to where I wanted her on her course.

Q. How far did you wish to pass from Lonely Island?

A. About a quarter of a mile—from a quarter to a half a mile.

Q. You did not rely on the compass?

A. That is what made me think that the compass was precisely the same as the one I had the year previous.

Q. You took the precaution to go up the mast-head?

A. Of course I was kind of anxious. I went there to relieve the master, and I was determined that nothing should happen while I was there.

Q. How close did you pass to Lonely Island?

A. I fancied I was about half a mile—that was, from the top of the fog.

Q. Your usual course would bring you about a quarter?

A. From a quarter to half a mile.

Q. You do not know whether your compass varied any in running that course or not?

A. I could not tell with the fog.

Q. Could you tell whether your compass varied in running
68 from Lonely Island to Cape Smith?

A. After that I could not see anything. I only put her on the course that I had the previous year.

Q. Could you see Lonely Island?

A. No.

Q. Did you have your note book with you?

A. Yes, sir.

Q. So that you had the assistance of that note book?

A. Yes.

Q. From Lonely Island to Cape Smith is how far?

A. It is about 18 miles.

Q. You are unable to state whether there was any variation between the true course of the compass at this point?

A. No, sir.

Q. What speed were you running?

A. About 13 miles.

Q. There is a difference in the action of compasses, is there not, on an iron vessel and a wooden vessel?

A. Of course, it is local attraction. There is hardly two vessels run the same course.

Q. So there is more attraction on an iron vessel than there is on a wooden vessel?

A. Yes, sir.

Q. To meet and obviate that what is done——

A. I do not think this compass was ever adjusted.

Q. It is usual to adjust them?

A. Yes, sir.

Q. Do you know that a compass is subject to still more attraction there than on other points?

69 A. On Lake Ontario there are two places that the compass is subject to attraction.

Q. On Lake Superior more than on Georgian Bay?
A. That is what I could not say.
Q. You understand that to be the rule—that compasses are specially adjusted to run on Lake Superior?
A. No, sir.
Q. You do not know about it?
A. No.
Q. Don't you know that there are more local attractions there?
A. No; I am not aware of it.
Q. Is the purser of the Spartan here?
A. He is here; yes, sir.
Q. You got off at Cape Smith?
A. No, sir.
Q. You went where?
A. To the Bruce mines.
Q. Your connection with the vessel ended between Owen Sound and Cape Smith?
A. Yes, sir.
Q. You have seen the Canadian Pacific Railway boats?
A. Yes, sir.
Q. You know as a matter of fact that their compasses are adjusted?
A. I know that——
Q. I think you said your purser was here?
A. Yes, sir.

Redirect:

Q. You were interrupted by Mr. Swan when you were going to say something about the Canadian Pacific steamers?
A. It was that it is only of late years that this has been
70 done; they are tested by the magnet; it is only of late years that this has been done on any vessel.
Q. Do you know the metallic boat that the Spartan carried?
A. I have seen it; it is in Owen Sound now.
Q. What have you to say about the use of a compass on such a boat as that being any test of the correctness of the compass?
A. I think it would be a hard matter to make a course on a small boat with a compass.
Q. I put the question directly to you, whether the use of a compass on such a boat as that would be any test as to the correctness of the compass?
A. I do not think it would.
Q. You say it would not?
A. I think not.
Q. Why?
A. You can never keep a small boat to the points of the compass at all, especially if there is any sea or wind. I know I have tried it several times myself to steer a small boat in a fog and never could do it correctly.
Q. That was a metallic boat?
A. Yes, sir.

Q. How would the fact that she carried iron for ballast affect the compass?

A. It would attract the compass, there is no doubt.

Recross:

Q. You do not know how it affected that compass?

A. No; I do not.

Q. Compasses run differently, do they not, on different courses?

A. They do; yes, sir.

Q. There is a degree of variation if you are running north
71 and from that east and west?

A. Yes, sir.

Q. Is it not also a fact that the further you diverge from a course north and south towards east or west the greater the divergence?

A. I cannot say that I am particularly aware of that; of course there are some compasses, unless they are adjusted you can scarcely find two to get the same course; there is always a difference.

Q. What I mean is that if a compass runs one course right there is no proof that it runs right on any other?

A. No, sir.

Mr. CANFIELD:

Q. You say there is a difference in different vessels and different compasses?

A. Yes, sir; I have scarcely known of two vessels to take the same course with a compass.

Q. To reach the same point?

A. Yes, sir.

—. You were at Buffalo?

A. Yes, sir.

Q. When?

A. About the last of August—the latter part of August.

Q. Whom did you meet with there representing the insurance Co.?

A. Crosby & Dimick.

Q. What conversation did you have with them, if any, about the payment of the insurance?

A. This was the first time that I went to Buffalo—was on account of asking them to advance money to the Dry Dock Co., with Captain Perry.

72 Q. Who were you acting for then?

A. The Dry Dock Company wrote me if we could advance this $7,000, and of course I consulted with our company and we did not feel inclined to advance any money on the boat at that time.

Q. Who were you representing?

A. The Owen Sound Steamship Co. They were not inclined to advance any. I went to Captain Perry and told him this. He says: If you will come here to Buffalo with me I think that can be arranged. I went to Buffalo with Captain Perry on that account. That was in August, the latter part; I am not quite certain of the date. I had not met Mr. Dimick before. I was introduced to him in the office, and Captain Perry told him our object in going there. Either

Crosby or Dimick asked me when the boat would be finished, and I told them I had received a message from McGregor the day before I left saying they expected to have her finished by Saturday. This was on Tuesday, if I recollect right. Says he, we have made up our minds not to pay a cent on this boat until the whole work is completed. Says he, I think it was Crosby that said it: Captain, you get all the bills in connection with the repairs of this boat, bring them here—they can be adjusted in a couple of days—and I will guarantee in two or three hours after that to give our check for our proportion.

Q. Where was that?

A. In their own office, in Buffalo.

Q. What further was said, if anything?

A. On those grounds I came on the train directly to Detroit, and told the Dry Dock Co. exactly what was said—what they said.
73 They said it would not matter much for two or three days longer, if they were going to be paid promptly on the completion of the boat.

Q. Did you go to Buffalo again?

A. Yes, sir; I think it was a week or ten days after.

Q. Who did you first see there?

A. I saw Captain Crosby.

Q. What conversation, if any, did you have with him?

A. It was principally about the duties. He in fact told us plainly at first they would not accept the amount of duties. We considered we had taken advice in Toronto, and we found out they were liable——

Q. Did you tell Crosby this?

A. I did; I told Crosby that we had taken advice and it was shown to us that they were liable for their proportion of that as well as to other repairs. He said they would stand a suit before they would settle.

Q. Was there any one present who represented the Richelieu & Ontario Navigation Co.?

A. No, sir.

Q. Did you have any further conversation with them with reference to duties—to the payment of duties?

A. No; I think not.

Q. Did you ever, representing the Owen Sound Steamship Co., request any work to be done there?

A. No, sir.

Q. Or order any work done?

A. Never.

Cross-examination:

Q. How long were you here the first time?

A. I think I was here two or three days. I do not recollect *the* exactly the time. She was in the dry dock when I came. I
74 think it was two days or three before they got the ballast out of her so they could hold the survey on the boat. I think it was two days or two and a half.

Q. Did you have her put in the dry dock for the purpose of holding a survey?

A. The first information I had of her being in the Detroit dry dock was a message that she was in the dry dock.

Q. Is that your signature (handing a paper to witness)?

A. Yes, sir.

(Paper marked Exhibit J, for identification.)

Q. You remained there two or three days; what did you do at that time?

A. At that time we paid off our crew at the Spartan.

Q. How long did it take you to do that?

A. A couple of days.

Q. What were you doing about these repairs at that time?

A. I was doing nothing at that time.

Q. Who was doing the work?

A. I do not think the work was entered into at all while I was there.

Q. You came back afterwards, didn't you?

A. That was some weeks after that.

Q. What instructions did you give Captain McGregor while here?

A. I did not give McGregor any instructions.

Q. You remember being at the Sault just after the stranding?

A. Yes, sir.

Q. Did you not there give instructions that the boat must be sent to Detroit?

A. No, sir.

75 Q. And that she would have to go to Detroit for repairs?

A. No, sir.

Q. You had this first talk with Crosby, you say, in the latter part of August, you think, at Buffalo?

A. I think it was the latter part of August.

Q. All you discussed there was the bills for repairs?

A. No; it was not on the repairs at all; it was on the money question, which they refused to advance.

Q. At that time had the adjustment been made?

A. No, sir; not at that time.

Q. Are you sure about that?

A. That was before the boat was completed.

Q. Didn't Captain Crosby tell you at that time that he would not advance any money—when your bills came in properly adjusted they would pay you what they ought to pay?

A. He said it would take only a couple of days to adjust them.

Q. The bills were not before you?

A. Not then.

Q. When did you go to Buffalo again?

A. Shortly after that.

Q. Were they there then?

A. The bills? I myself instructed Captain McGregor at this time to get the bills of repairs and take them to Buffalo as soon as he possibly could.

Q. And deliver them to whom?

A. Crosby & Dimick.

Q. And those were the bills produced this morning by Captain McGregor?

A. I fancy so.

76 Q. These bills (showing papers to the witness)?

A. I suppose they are. I did not initial the bills or look over them.

Q. You had two or three conversations?

A. I think I was there three times—at Buffalo.

Q. The adjustment was not before you gentlemen at either time, at either of those visits?

A. No.

Q. So that the extent of the claim was not known?

A. No.

Q. Didn't Captain Crosby say to you he would settle all the accounts—all the bills, &c.—and after a proper adjustment that if there was any found due from the company he would pay you?

A. He never expressed himself in that way.

Q. Were you not representing the Owen Sound Steamship Co.?

A. Yes, sir; I was.

Q. It was not then known what the amount of the bills would be?

A. Not the exact amount, I fancy.

Q. All that you talked about, then, was these bills?

A. I do not know exactly; I disremember what we did talk about.

Q. Do you know whether the adjustment had been called to their attention then?

A. I am not sure whether it was or not.

Witness also testified that he sent the telegram, Exhibit L, which witness Crosby said he acted upon, to Charles Perry, which telegram is set forth in testimony of said witness Crosby.

Plaintiff's counsel, for the purpose of showing the amount due to the Dry Dock Company for the repairs furnished to the Spartan on account of this disaster, then offered in evidence a libel filed in the district court of the United States for the eastern district of Michigan, in admiralty, by the Detroit Dry Dock Company against

77 the steamer Spartan to enforce its lien for repairs made upon the steamer in consequence of the aforesaid stranding; also the process of said admiralty court under which the vessel was seized, the publication of notice and the decree of said court, the order of the court referring to a commissioner to ascertain the amount due, and the final decree of the court upon the report of said commissioner; which record was objected to by the defendant's counsel as incompetent and irrelevant. The objection was sustained and the evidence excluded by the court, to which plaintiff's counsel did then and there except.

PLAINTIFF'S COUNSEL: "In addition to my offer of the decree to show the fact of what the amount was, I wish to show the fact that she was seized by the process of the district court and condemned

and sold on account of this claim of the Dry Dock Company for the purpose of showing a constructive acceptance by the defendant of the abandonment."

The evidence was objected to by defendant as incompetent and irrelevant. The objection was sustained by the court and the plaintiff's counsel duly excepted.

Plaintiff also called George P. Megann, who testified that he was the secretary and treasurer of the Owen Sound Steamship Co.; that in September of 1883, before the repairs were completed, he went to Buffalo with Captain Perry and called on Smith & Davis, general agents of the defendant company. "We spoke about the stranding of the 'Spartan' and the accounts, and Mr. Davis said he was willing to leave the matter, as I understood, to Crosby & Dimick; that he was perfectly willing to have the thing settled.

"The vessel was then in process of being repaired. I was there afterwards with Captain McGregor and Mr. Milloy about the middle of October. We went to Crosby & Dimick and had a long
78 talk there. Crosby & Dimick said they would stand a suit before they would pay the duties (charged by the Canadian Government on the repairs). That, I remember, was the expression that Crosby made use of. We tried to see if we could not get some amicable settlement—have the thing arranged so our company could get the boat back. Crosby & Dimick together made an appointment with Captain McGregor to meet some gentlemen and go into the accounts next day for that purpose. Myself, McGregor, and Patterson represented the Owen Sound Steamship Company, to whom the steamer was chartered by the plaintiff in this case."

Plaintiff's counsel then called Thomas Harbottle as a witness, who testified that he was the second mate of the Spartan, and was on watch the night of the stranding until released by Waggner, the first mate, about 1 o'clock a. m.; that when Waggner took the deck witness gave him the steamer's course as southeast and by east, which course the Spartan had held from before 10 o'clock p. m. of June 18th; that Captain McGregor had given witness that course.

On cross-examination said witness testified that the season of 1883 was his second season as an officer and his first season on Lake Superior; that he had never run on the course between Passage Island and Caribou before that trip; that he was alone in charge of the steamer's navigation from 8 or 8.30 p. m. until relieved by Waggner, and Frank McGregor, the captain's son, was at the wheel. Witness identified the written instructions for the navigation of the steamer referred to by Waggner and McGregor. Witness further testified that he steered the course specified in the written instructions until he came off watch, running the steamer at full speed; that from 10 o'clock p. m. it continued foggy; that witness united with the master, McGregor, and the first mate in the protest, Exhibit C.

79 Q. On the course on which you were running that night, where should you have come out?

A. How far ought we to have been out?
Q. Yes, sir.
A. About 16 or 17 miles.
Q. What took you there on Caribou Island?
A. It must have been the fault of the compass.

Witness further testified that he took no sounding; that when the steamer stranded he came up and found it still foggy—as thick as ever; we could see nothing then.

On re-examination he testified that he shipped on the "Spartan" from La Chene, and was on watch a part of the time. There was no difficulty on account of the compass in coming up; that he had not observed any trouble on any trips prior to this on Lake Superior.

There was no evidence except as herein stated to show that the plaintiff took any part in the efforts to rescue said steamer or to bring her to Detroit, or gave any directions as to her being repaired or contracted for such repairs. Plaintiff then rested.

80 The defendant, to maintain the issue on its part, called Stephen L. Wagner as a witness, who testified that he was 42 years of age and resided at Sarnia, Ontario; that his business was sailing, and that he had sailed for 25 years on the Great Lakes; that he was first mate of the "Spartan" at the time of the disaster; that the "Spartan" left Port Arthur at 8.30 a. m. of June 18th, 1883; that he was on deck at 6 o'clock in the evening of that day; the weather was then thick and foggy—a dense fog; that at about 20 minutes past 1.00 a. m. of June 19th he took charge of the deck; that there was then a dense, thick fog—you could not see anything; that when he came up on deck the second mate, Harbottle, was in command; that witness supposed the steamer was running then wide open; that he asked Harbottle how he was steering and he said southeast by east, and said "Your orders are up in the wheel-house." Witness then identified the paper containing the instructions of the master under which the vessel was run, which instructions are set forth in full in the testimony of the witness McGregor; that the full speed of the "Spartan" was 13 miles an hour; that after he took charge there was no one else on deck but witness and the wheelsman.

Q. State whether or not there was any look out forward.

(Objected to as irrelevant; objection overruled by the court, and the plaintiff duly excepted to the ruling.)

A. There was none.

That he found no look out in Harbottle's watch—found Harbottle there alone; that no soundings were taken; that in the judgment of the witness the rate of speed at which the steamer was run was not safe or proper under the circumstances then existing.

Q. Why was not the speed of the vessel reduced?
A. I could not do it.
81 Q. Why?
A. She was running on time.
Q. What would have been the effect if you had reduced the speed?

A. It would have thrown him out.

Witness further testified that he read the instructions given Harbottle by Captain McGregor at the time he came on watch; that after Harbottle left the deck witness stood by the bell-pull, after he had blown the whistle of the "Spartan," to see if he could get an echo.

Q. When did you first signal the engineer?

A. I saw a change on the water; I could not see anything, but I imagined I could see something ahead and I stopped her; gave him a bell to stop and reverse, but she struck before she reversed, and went out good.

Witness further testified that if the "Spartan" had been running at half speed they might have backed her off.

Q. To what did you attribute her stranding?

A. I think it was the compass; she was steering one quarter of a point off her course to the southward; on the course that we run she ought to have cleared Caribou Island 12 or 14 miles.

Q. At the time she stranded how was the fog—the actual time of stranding?

A. I could not see anything; I could not see the length of the boat.

Q. What effect did her speed have on her stranding when she went ashore?

A. If she had been going slow you could have backed her off; at least I think you could have made a trial anyway.

That there was no light on Caribou Island; it was uninhabited; that he steered the boat by the spirit compass. I think there
82 was another compass in the pilot-house—a card compass; I am not sure, though.

Witness further testified that he used the spirit compass after the stranding when he went in the small boat to Sault St. Marie for assistance and steered the boat by it; that he started from Caribou Island in the small boat for Whitefish Point, and steered a southeast by east course, but brought up between Lizzard Island and Montreal Island, about 40 miles from the point for which he steered. Witness further testified that he united with the master in making the protest and identified the paper hereto annexed, marked Exhibit C, as the protest which was made. Defendant's counsel then offered said protest in evidence. Plaintiff objected to the same as incompetent, and the objection was overruled by the court and said protest was admitted in evidence; to which said ruling plaintiff duly excepted.

Q. What was the condition of that compass?

A. In what way do you mean?

Q. Was it a reliable compass?

A. I suppose it would be; it was a little out.

Q. State whether or not the master knew of this defect.

A. He spoke to me about it and said it was a little out; it was not like his other compass that he had on the Smith; he was mak-

ing her courses as fast as he went over the route; he said it was a little out.

Q. What did he say of the compass at the time of making the protest?

A. He said he laid it solely to the compass.

Q. The stranding?

A. Yes, sir.

Witness further testified that he heard Captain Swain, of the tug Winslow, and Captain McGregor, of the Spartan, talking at
83 the Sault about where the steamer was to go; that when they got to Detour, Captain McGregor told Captain Swain to keep pretty well on the west shore of Lake Huron, and when they got down to St. Clair river, Captain Swain hailed Captain McGregor to know if he should stop at Port Huron. Captain McGregor said to take her along to Detroit.

Witness further testified as follows:

Q. Why were no soundings taken before the stranding of the Spartan?

A. I did not want to stop her; if I had stopped her I would have knocked his calculations all to pieces; you have got to check a boat to take soundings—slow her speed.

Witness further testified that his wages were $50 per month.

On cross-examination witness testified that Captain McGregor said the compass was a little out.

Q. You stated, did you not, that you supposed the compass was a reliable compass?

A. I said it was like a good many others, like a good many compasses; a little out.

Q. What do you mean; that it varies?

A. They all vary up there. Those that have not been adjusted, they vary more at certain points than others; a compass that is adjusted should not vary at all.

Q. Is it not customary in case of danger for the officer of the deck to call the master?

A. Well, I had my orders to go right along—the written orders that have been produced here.

Q. I ask you again, in case of danger is it not usual for the mate to call the master?

A. If he leaves orders, it is not; that is all that is handed down.

84 That he did not know how much the variation of the compass was; the master always gave his own course; that in running in the small boat from Caribou to the Sault he steered southeast by east, but the course actually run must have been ½ south, or something like that, judging by where she fetched up; there was considerable sea; the small boat was 22 feet long and 4 feet beam; it was foggy when we went to the Sault.

Defendant's counsel then called Samuel S. Malcolmson as a wit-

ness, who testified that he resided at Toronto, and his business was that of a marine engineer, and had been for 27 or 28 years; that he was chief engineer of the Spartan at the time of the stranding; that his watch was the fore part of the night, and he remained on watch until 1 o'clock a. m., when the second engineer took charge; that during his watch there was a dense fog, which continued all night; that during his watch he carried about 45 or 47 pounds of steam; that the Spartan's maximum steam pressure was 47 pounds; that the Spartan's speed was about 13 miles an hour and she continued to run at that speed until Caribou Island brought her up; that after coming off watch at one o'clock he went forward of the cabin and there remained half an hour or more, during which time there was no lightening of the fog; that there was no lookout on deck; that he saw no one forward on the boat, except Wagner and Harbottle, but could have seen them if there had been any one there; that no bells were rung to check the speed of the vessel from the time witness' watch terminated until the stranding; that unless particular orders to the contrary were given the custom was to run the Spartan the way she was running; that when the steamer stranded witness was asleep or dozing, but he immediately arose and went into
85 the engine-room, and casually looked at the steam-gauge (it is my regular custom), and found she was carrying about forty-five pounds, her regular steam; that in the judgment of the witness, in the condition of the weather that night, the speed of the steamer was too fast; that at the time I was on deck with Wagner and Harbottle I do not suppose you could see half the length of the boat.

Witness further testified that it would cost about $150 to repair the damage done to the boiler by the stranding; that witness' wages as chief engineer were $75 per month, and the wages of the firemen were from $20 to $25 per month; that there were no firemen on the steamer who received $30 per month.

Q. How much carpet did you see squandered there?

A. I measured no carpet.

Q. Do you know of any being used for leaks?

A. There was some, but I do not think there was a great deal of it.

Q. About what would be your estimate—a fair estimate—of the quantity used?

A. That I could not say. The carpet would be handed to me and I would use it. Perhaps it was bundled up—given to me in a bundle—and I would not take any notice. I do not think there was very much used there.

Q. You may state where it was used—what carpet you saw used.

A. Any that I saw used was used in around the engine, down below at the end of the boilers.

Q. Can you state approximately the quantity of that carpet—a quantity not exceeding what?

A. I should not think there was more than 15 or 20 yards, if there was that; 20 yards, I should think, would cover it.

That while endeavoring to release the steamer witness heard Captain McGregor giving orders to Captain Swain.

86 On cross-examination said witness testified that he did not hear McGregor suggest taking the steamer to Owen Sound; that he left the steamer 4 or 5 days after she got to Detroit; they had taken off the wooden sheathing before he left; could not tell if the survey had been completed; that he heard Captain McGregor suggest that the steamer be taken to Michipocoten.

He further testified that on the night of the disaster his watch commenced about 6 o'clock in the evening and continued until about 1, when he was relieved by the second engineer. He turned in and went to sleep, "and slept until I felt her aground; that awoke me. After she grounded I came out, went into the engine-room, and naturally looked at the steam-gauge. I recollect doing so immediately as I went into the engine-room; the engine was then working reversing. After the stranding, after they got her pumped out, I commenced work at stopping the leaks. That was after the tug came back there. I worked all over the boat, principally in the part of the boat about the engine. I not only used mattresses, carpets, and pillows and other things which were handed me for the purpose of stopping the leaks, but also what I took myself; some I took and some were brought to me. A part of the time the work of stopping the leaks might have been going on in the forward part of the boat, but not at all times. There were a good many leaks forward. The rest of the officers and crew were working as well as us, but I did not say that they were working at those leaks. The leaks forward were being stopped at the same time I was stopping them about the engine. Of course, I could not be in two places at once—could not be at the engine and know what they were doing forward. We all worked faithfully and well for the purpose of rescuing the vessel; were working in the water a portion of
87 the time. My wages were $75 a month. There was a bonus of $25 given me for extra work at the same time I received my wages."

On redirect examination he testified that McGregor's purpose in wanting to go to Michepocoten was to put the steamer in trim to go down the lakes; there was a safe harbor there, but no facilities for repairing the steamer.

Defendant's counsel also called Martin Swain, who testified that he was master of the tug "Winslow;" that he went to the relief of the "Spartan," and reported to Captain McGregor.

Q. Under whose instructions did you act there in the work necessary to release the vessel?

A. I worked under Captain McGregor's instructions and I worked under my own.

He further testified that he went to the Spartan under instructions from the owner of the Winslow. The instructions were to go to Caribou Island for the Spartan; that he left Detroit under those instructions and arrived at Caribou at noon of June 25th, two days

after leaving Detroit; that when the Spartan was first got afloat we first calculated to go to Michepocoten. We put a diver under her by Captain McGregor's instructions, but she rolled over and filled through the hatches, and we had to put her ashore again; but when we got her afloat the second time we sent a diver down to make necessary repairs, and we thought we would come right to Detroit; but it was not determined where the vessel would be taken when we left Caribou.

That he had no orders where to take the steamer when she was got off, and so informed Captain McGregor, and he said the best place to take the boat was to Detroit. McGregor said nothing about going to Owen Sound. We talked the thing over, and when
88 we got down to the Sault there was no information there where to take the boat, and we came to Detour, and the patches had blowed off on our way down, so she commenced to leak more, and we put her in shoal water and sent a diver down again to fix her up, and McGregor then said he would come on to Detroit; so we came to the conclusion, Captain and me, to stop at Port Huron and see if they had any orders there, and I told him if he wanted me to stop at Port Huron he should sing out; and when we got to Port Huron I hailed him and asked him if he wanted to stop there, and he said No, go on to Detroit; where we arrived about 12 or 2 o'clock in the morning. There were no orders there, and when I found it so McGregor told me he had made arrangements to put her in the dry dock, which we did.

He further testified that Caribou Island is in Canadian waters; that in working to release the Spartan he considered himself subject to McGregor's orders, and told McGregor he would pull any way McGregor wanted him to pull; that he came there to work for him and it made no difference how he pulled.

On cross-examination witness testified that when Grummond ordered him to go to the aid of the Spartan he gave him two telegrams from Crosby, which witness has lost. One telegram asked Grummond if he could send the Winslow, two steam-pumps, and a diver and a hawser to the Spartan, and the other said, "Send her at once."

Q. You said you saw Captain McGregor up there. State whether, in your judgment, he made unusual efforts to relieve the steamer Spartan.

A. He did more work than any captain I ever saw.

Q. Do you think the running of a metallic boat 22 feet keel and four feet beam across Lake Superior would be a fair test of the compass as to following a course?

A. I could not say as it would be much of a test.

89 Q. Why not?

A. Well, there are several reasons.

Q. Just give them, so the jury may understand them.

A. One reason is that a small boat, unless the water is very still, will jump around so it will throw the compass off its guards; it won't work. Another reason is she has got a sail and no centre-board;

she is liable to go sideways half a point or three-quarters of a point, and you might not notice it.

Q. Would you think running such a boat as that from Caribou Island on a course for Whitefish Point she would fetch up on Lizzard Island?

A. No; not if she was well handled.

Mr. SWAN: It would depend on the way she was handled largely, irrespective of the compass?

A. Yes, sir; I think the handling wants to come in.

90 Defendant also called as a witness Thomas G. Crosby, who testified that he met Captain McGregor at Detroit while the Spartan was under repair, and McGregor informed witness that he (McGregor) was superintending the repairs; that witness then said, "You want to be careful to keep what is in the survey separate from what is outside." Witness further testified that he gave no orders or instructions to any person or persons whatsoever as to the repairs on the steamer, nor did he assume any responsibility therefor; that witness's object was not to assume responsibility; that on June 22, 1883, he received the following message, marked Exhibit I, from Toronto:

TORONTO, ONT., 22.

Crosby & Dimick:

Following message received from Owen Sound:

"Spartan ashore on Caribou Island, Lake Superior. Captain asks for two steam-pumps, diver, tug, and hawser. Advise Capt. Perry if he can send assistance and let me know.—F. Patterson."

CHAS. PERRY.

That witness acted on said telegram and wired Capt. Grummond, "Can you furnish pumps, hawser, diver, to Spartan ashore at Caribou Island at once?" and notified Perry we had sent assistance from Detroit; that he sent Gibson to Detroit to act on the survey on the Spartan, and afterwards sent him to see that no more repairs were put on the steamer than were called for by the survey, as the Spartan had been damaged on previous occasions and not properly repaired.

Defendant's counsel also offered evidence tending to show that repairs were put on the chimneys of the Spartan which were not rendered necessary by the stranding, the costs of which were about $150, and also that radiators were put on the Spartan which were not rendered necessary by the stranding, and that the costs of
91 such repairs and radiators are included in the adjustment served on defendant's agents and in the bill of the Detroit Dry Dock Company rendered for the repairs of the Spartan.

Defendant's counsel then offered in evidence the statute of the Dominion of Canada, being chapter 29, 43 Victoria, entitled "An act to make better provisions respecting the navigation of the Canadian waters," assented to May 7th, 1880, which statute contains the following, among other, provisions, to wit:

Article 13. "Every ship, whether a sailing ship or steamship,

shall in a fog, mist, or falling snow go at a moderate speed." Also the following article:

Article 24. "Nothing in these rules shall exonerate any ship or owner or master or crew thereof from the consequences of any neglect to carry lights or signals, or of any neglect to keep a proper lookout, or of the neglect of any precaution which may be required by the ordinary practice of seamen or by the special circumstances of the case."

6. "If in any case of collision it appears to the court before which the case is tried that such collision was occasioned by the non-observance of any of the rules prescribed by this act the vessel or raft by which such rules have been infringed shall be deemed to be in fault, unless it can be shown to the satisfaction of the court that the circumstances of the case rendered a departure from the said rules necessary."

7. "In case any damage to person or property arises from the non-observance by any vessel or raft of any of the rules prescribed by this act such damage shall be deemed to have been occasioned by the wilful default of the person in charge of such raft or of the deck of such vessel at the time, unless the contrary be proved
92 or it be shown to the satisfaction of the court that the circumstances of the case rendered a departure from the said rules necessary, and the owner of the vessel or raft, in all civil proceedings, and the master or person in charge as aforesaid or the owner, if it appears that he was in fault, in all proceedings, civil or criminal, shall be subject to the legal consequence of such default."

The foregoing is substantially all the evidence in the case respecting the loss of said steamer, her subsequent rescue, and the repairs made in consequence of her stranding; the abandonment to the underwriters by the plaintiff.

93 And thereupon the case was rested by both plaintiff and defendant, and plaintiff's counsel then requested the court to instruct the jury as follows:

1. If the jury find that the Spartan, while navigating Lake Superior on June 19th, 1883, and while a dense fog prevailed, was stranded on Caribou Island, and that the insurers were promptly notified of the disaster, and that proper proofs of loss were furnished to the insurers, then the plaintiff has made a case which *prima facie* entitles it to a verdict in this case.

But the district judge then and there refused to instruct the jury according to said request; to which refusal on the part of said district judge the plaintiff, by its counsel, did then and there except.

And thereupon plaintiff's counsel did further request the court to charge the jury as follows:

2. The stranding of the Spartan on Caribou Island while a dense fog was prevailing was an accident which is *prima facie* covered by the policy and for which the insurers are *prima facie* liable.

But the said district judge then and there refused to instruct the jury according to the said plaintiff's second request; to which refusal on the part of said district judge plaintiff's counsel did then and there duly except.

And thereupon the plaintiff's counsel further requested the said district judge to instruct the jury as follows:

3. If the jury find that the fog contributed proximately to the stranding of the Spartan, then the insurers are liable for the loss caused by such stranding.

But the said district judge then and there refused to instruct the jury according to the plaintiff's said third request, and to said refusal on the part of said district judge the plaintiff, by his
94 [its] counsel, then and there duly excepted.

And thereupon the plaintiff's counsel did further request the said district judge to instruct the jury as follows:

4. There is no evidence in the case which even tends to prove the unseaworthiness of the Spartan except in regard to her compass, and if the jury find that the compass had not varied more than vessels' compasses ordinarily do, that the steamer had been navigated by the same compass without trouble from the time that she left La Chene, on the St. Lawrence river, up to the time of the disaster, and that the officers of the steamer at the time she started upon the voyage on which the stranding took place believed the compass to be reliable, and had reason for so believing, then the insurers would not be relieved from liability on account of any supposed defect in the compass.

But the said district judge then and there refused to instruct the jury according to the plaintiff's said fourth request; to which refusal on the part of said district judge the plaintiff, by its counsel, then and there excepted.

And thereupon plaintiff's counsel did further request said district judge to instruct the jury as follows:

5. If the jury find that the insurers received the notice of abandonment which has been offered in evidence, and that without notice to the owners of the steamer they sent Captain Swain with a wrecking expedition to her rescue, and that Captain Swain brought her to Detroit for repairs, and was paid for doing so by the insurers; that the steamer was subsequently surveyed for repairs by the insurers and repaired, and that the owners never interfered with the making of the repairs, then the jury may consider these facts as evidence of an acceptance of the abandonment.

95 But the said district judge refused so to instruct the jury according to the plaintiff's said 5th request; to which refusal the said plaintiff, by its counsel, then and there excepted.

And the plaintiff's counsel thereupon further requested the court to instruct the jury as follows:

6. If the jury find that the insurers, upon receiving notice of the abandonment from the owners, sent a rescuing expedition for the purpose of rescuing the Spartan and taking her to a place of repair, and that the Spartan was gotten off by the wreckers and brought to Detroit for repairs and was there repaired without any notice whatever to the plaintiff, and that the plaintiff never interfered with or exercised any control over or made any claim to said steamer after their abandonment, then the jury may consider these facts as

evidence tending to prove an acceptance of the abandonment on the part of the insurers.

And the said district judge then and there refused to instruct the jury according to the plaintiff's said 6th request; to which refusal the plaintiff, by its counsel, did then and there duly except.

And the plaintiff's counsel thereupon further requested said district judge to instruct the jury as follows:

7. If the jury find that the insurers sent the wrecking expedition to the Spartan with the intention of rescuing and repairing her without consulting the plaintiff, then it was the duty of the insurers to repair her within a reasonable time and tender her back to the owners free from all liens for such repairs. Their failure to do so is evidence of an acceptance of abandonment and their liability to pay as for a total loss.

96 But the said district judge then and there refused so to instruct the jury according to the plaintiff's said 7th request; to which refusal plaintiff, by its counsel, then and there duly excepted.

And thereupon the plaintiff's counsel did further request the said court to instruct the jury as follows:

8. If the jury find that the insurers brought the Spartan to Detroit with the intention of repairing her, and that she was subsequently repaired without interference on the part of the plaintiff; that the insurers failed to pay for said repairs, but allowed the steamer to be libeled and sold by the court of admiralty to satisfy the lien for such repairs without notice to the plaintiff, then this would amount to an acceptance of abandonment.

But the said district judge then and there refused so to instruct the jury according to plaintiff's said 8th request; to which refusal plaintiff, by its counsel, then and there excepted.

And thereupon the plaintiff's counsel further requested the said court to instruct the jury as follows:

9. If the jury find that there was an actual or constructive acceptance of the abandonment, then the plaintiff is entitled absolutely to recover as for a total loss.

But the said district judge did then and there refuse so to instruct the jury according to plaintiff's said 9th request; to which refusal plaintiff, by its counsel, did then and there except.

And thereupon the said district judge instructed the jury as follows:

97 *Charge of the Court.*

GENTLEMEN OF THE JURY: This is action by the Richelieu & Ontario Navigation Company of the Dominion of Canada against the Boston Marine Insurance Company to recover the sum of ten thousand dollars insured by this company upon the steamer Spartan, of which the plaintiff was the owner. In order to determine the scope of the liability of the defendant in this connection I will call your attention to the language of the policy, in which the liability of the defendant is stated as follows:

"Touching the adventures and perils which the said insurance company is content to bear and take upon itself by this policy, they are of the lakes—that is, the perils of the lakes, rivers, canals, jettisons, that shall come to the damage of the said vessel or any part thereof—all of these being comprised under the general term of the perils of the sea or the perils of navigation. The company does not agree, however, to indemnify the plaintiff against all damages that might happen in the course of the navigation of the vessel or of all the misfortunes that may befall her while upon the seas, and there are excepted from the provisions of this policy and from the liability of the defendant, as there are in all or nearly all marine policies, certain risks which the defendant does not take upon itself to bear, and they are described as 'the perils, losses, misfortunes, or expense consequent upon or caused by the following or other legally excluded clauses, viz.: Damage that may happen by the vessel hereby
98 insured to any other vessel or property, incompetency of the master or insufficiency of the crew, or want of ordinary skill in navigating said vessel, and in loading, stowing, or securing the cargo of said vessel, overloading, and all other unseaworthiness'—that is, the purport of these exceptions, so far as this case is concerned, is that the company does not undertake to insure any loss to this vessel which may be occasioned by the incompetency of the master, the insufficiency of the crew, or want of ordinary skill and care in navigation, or any unseaworthiness of any description."

Now, at the outset of this case we are confronted with the main defense, which is that this vessel was unseaworthy; in other words, that she was not properly equipped for the business in which she was engaged, and by the general term unseaworthiness is included any defect either in the construction of the vessel or in her equipment. There is but one defect in this connection to which it is necessary to call your attention, and that is the want of a proper compass, and upon these points I shall charge you simply that if you find that this vessel was stranded upon Caribou Island by reason of a defective compass there can be no recovery here, because the vessel was in that respect unseaworthy, and the loss is a loss by unseaworthiness. I shall not review at length the testimony upon this point, because it is very brief, and the case I will not say reduces itself to this one question, but certainly it is a very important question to consider, and that is whether this vessel was or was not lost through a defective compass. The circumstances of this loss are such
99 as seem to me to require explanation on the part of the plaintiff.

She leaves Passage Island bound for Whitefish Point, she encounters no storms, she encounters no unusual sea, and still upon this voyage, keeping off one point or half a point to the southward of the usual course on account of the fog, she runs ashore upon Caribou Island and is lost. Upon the course upon which that vessel is said to have been steered she should have passed about 16 or 17 miles from Caribou Island. Upon the ordinary course from Passage Island to Whitefish Point she would have passed about 8 miles; but if we are to believe the testimony of plaintiff's witnesses in that partic-

ular, as I said before, she took a course, on account of the fog, somewhat southerly of the most direct course between the two points, and she should have been carried some 16 miles to the southward of Caribou Island, and yet, notwithstanding this precaution, she runs ashore. Now, gentlemen, if you find that she was carried ashore by the current or by any mysterious cause which you are unable to explain, then the loss will be within the policy and the plaintiff would be entitled to recover; but if you should find that she got off her course by reason of a defective compass or that she was navigated at too great a speed, then the defendant is entitled to your verdict.

Upon the question of speed I will have a word to say, although it is covered, so far as the law of the case is concerned, by my general charge, that if you find the loss occurred by her being navi-
100 gated at an excessive speed, there can be no recovery; still it is for you to judge whether, under all the circumstances of the case, she was navigating at too great a speed. The law of Canada provides: "That all vessels shall run in a fog at a moderate rate of speed." Now, it strikes me—but the question is one for your determination—that a vessel is not under an obligation while navigating the open lakes to slacken her speed because of a fog unless there is some reason to apprehend collision with another vessel, or unless the vessel is so near the shore or known to be so near the shore that she might run upon it, unless she was navigated at a less rate of speed, and if this compass had been a proper compass, and there was no reason to think it was otherwise, I should feel loth myself to charge the vessel with fault on account of excessive speed. On the other hand, if this compass were known to the captain or he had good reason to believe it was defective, then it would strike me that in passing in the neighborhood of Caribou Island he should have directed the speed of the steamer to be slowed. But, as I said before, gentlemen, that is a question for your consideration, and I do not undertake to direct you one way or the other in regard to this fact, but merely to say in general terms that if you find that the loss was occasioned by the excessive speed of the vessel or by her want of a lookout or by the defects of the compass the defendant is not liable. With regard to the defective compass, the master and crew state in their protest that they attribute the loss to a defective com-
101 pass, and while that statement is not binding upon the plaintiff here and while the plaintiff is not estopped, as we say, or prevented from showing that the loss is attributable to other causes, it undoubtedly is entitled to considerable weight. On the other hand, it is shown that the vessel had navigated from Owen Sound up to Sault St. Marie and from the Sault up to Port Arthur with this compass, and that no unusual deviation had been detected, except that the captain thought the compass was a little slow, as he said. Now, then, gentlemen, in case you shall find, as I have said before, that this loss was occasioned by a defective compass, the defendant is entitled to your verdict. On the other hand, if you shall find that the loss occurred through peril of the sea and from no want of skill in navigation and no want of competency in the master or sufficiency of the crew and from no fault on the part of the vessel,

then your verdict should be for the plaintiff, and that leads to consider the amount in which this verdict should be rendered.

The plaintiff claims the entire amount of the policy which should be awarded to him—that is, if you find that the loss was what is termed in the law a total loss he should be entitled to that verdict. A total loss is of two kinds, actual and constructive. An actual total loss occurs where the vessel is wholly destroyed or is so effectually broken up and wrecked that the cost of repairing her would exceed her entire value when repaired.

That is what is termed in law an actual loss. But a constructive total loss occurs where a vessel is wrecked and the expense
102 of getting her off and saving her and repairing her exceeds one-half of her value when repaired. That is termed a constructive total loss, and entitles the plaintiff to recover as for a total loss if he abandons the vessel to the insurance company, and in such cases, in order to entitle the plaintiff to recover as for a total loss, when the loss is only constructively total, it is necessary that he should have abandoned her to the insurers.

This leads me to speak of the abandonment in this cause. The only evidence of abandonment is a telegram dated on the 26th of June, 1883, addressed to C. Perry, insurance agent, Toronto, Mr. Perry being the broker who negotiated this insurance through Crosby & Dimick, the agents of the company at Buffalo. The language of the dispatch is as follows:

"Spartan ashore on Caribou Island, and this company beg to inform you that they abandon the boat and claim a total loss. Please inform the underwriters.

"(S'g'd) J. N. BEAUDRY,
"Sec'y R. & O. Nav. Co."

The defendant claims it is not bound by this abandonment because the policy provided that no abandonment in any case whatever, not even when the right to abandon exists, shall be held or allowed as effectual and valid unless it shall be in writing, signed by the insured, delivered to the company or its authorized agent, nor shall it be sufficient if an unincumbered and perfect title to the subject abandoned cannot be given, and the valuation of said vessel expressed in this policy shall be considered the value in adjusting the losses covered by this policy.

103 Exception is taken to this abandonment upon the ground, in the first place, that the cause of abandonment is not stated. But upon that point I charge you, gentlemen, that as it is stated in the abandonment that Spartan is ashore upon Caribou Island, that so far as that requisite is concerned the abandonment is sufficient, the company being charged with notice that Caribou Island is an island in Lake Superior, and that a vessel ashore upon that island would in all probability suffer a total loss, unless she was gotten off and taken to a port of safety.

The second objection taken to the abandonment is that it was not sent to the agent of the company, but to Perry; but upon that point I charge you that inasmuch as Mr. Perry swears that he sent this

abandonment to Crosby & Dimick, the agents of the company at Buffalo, that that is a sufficient delivery to them to vest in the underwriters title to the property abandoned.

The third is that it is not signed by the president or other authorized officer of the plaintiff corporation, but is signed by Mr. Beaudry, who purports to be the secretary of the Richelieu & Ontario Navigation Company. Upon that point I charge you as follows:

"That the secretary has not by virtue of his office the right to make an abandonment of a steamer, so as to vest a perfect title to the same in the underwriters; but if you find that the president of this corporation went to Buffalo and claimed a total loss in this case that may be considered by you, you would be authorized to treat that as a ratification of the act of the secretary in making this abandonment to the defendants.

104 Now, in order to entitle the plaintiff to recover the full amount of this policy—that is, the sum of ten thousand dollars—you must find not only that there has been an abandonment made, but that the expense of getting this vessel off and of repairing her exceeded the sum of twenty-five thousand dollars.

Mr. SWAN: $10,230.

COURT: $10,230, from which should be deducted the extra compensation that was paid to the master and to the crew, which, I think, the plaintiff is entitled to charge the defendants, and also for any excess of property used—blankets, mattresses, or any other property claimed to have been used in stopping leaks upon the vessel. There is quite an amount of this property charged in the adjustment, which is claimed by the defendant was not actually used. If you find that there has been an overcharge in that particular, that should be deducted from the amount of the bill in getting this vessel off. The bill for repairs was something in excess of $21,000. From that should be deducted $\frac{1}{3}$ of the cost of such repairs as were not put upon the iron hull. The ordinary rule is that there shall be a reduction of one-third new for old for repairs, but in this policy there was no deduction of that kind to be made on the hull, so that so far as the hull is concerned the plaintiff is entitled to charge the whole amount of those in his bill, but as to all other repairs not made to the iron hull there should be made a reduction of one-third new for old in this bill, and also a reduction for any repairs made that were not necessary to restore the vessel to the condition

105 in which she was before this accident occurred and by reason of the damages received from this accident. There is some evidence that additions were made or repairs were put upon her chimney that were not rendered necessary by this accident, and that there were three warming radiators put in the vessel, probably for the purpose of warming her, which were not rendered necessary by the stranding. Now, if after making all these deductions you find that the expense of getting her off and the expense of the repairs added together exceeded the sum of $25,000, and you further find that she was duly abandoned to the underwriters, if you find the plaintiff is entitled to recover at all, he would be entitled to recover as for a total loss.

Mr. SWAN: Would your honor not like to qualify that a little, with reference to the uninsured interests? Four-fifths of this loss is chargeable to the insurance. The valuation being placed at $50,000, the insurable interest would be $40,000.

Mr. MOORE: One-half the amount insured, if you deduct one-fifth—one-half the amount insured—in other words, if the one-fifth insured interest is deducted, then, of course, it is only $20,000. It is just as broad as it is long.

COURT: It makes no difference, does it, Mr. Swan, whether you compute the cost of the repairs in getting her off at $20,000 or $25,000; if I deduct one-fifth the four-fifths need not exceed $20,000 in $25,000.

Mr. SWAN: Oh, no; that is the rule as laid down in the Wesley case. The policy reads as follows: that unless the amount to be paid by the insurer upon the adjustment of partial loss shall exceed one-half——

106 COURT: That is not half of the amount insured.

Mr. MOORE: There certainly can be no sense of reason in Mr. Swan's construction of it, because such was not the construction of Justice Matthews. If the one-fifth insured by the owners is deducted, of course it is only one-half the amount insured by the company, which is only $40,000.

Mr. SWAN: Oh, no. The easiest way in the world——

COURT: No, there can be no abandonment unless the amount which the insurer would be liable to pay under an adjustment as of a partial loss shall exceed half of the amount insured.

Mr. SWAN: The Massachusetts cases say the expenses must exceed $25,000.

COURT: I do not know, gentlemen, that I care to present that to your attention any further. It has not been presented in any of the requests to charge, and I will leave it as I have charged you upon that point.

Mr. MOORE: It would seem to me the better way would be to find the amount expended and leave it to the adjuster to determine that.

COURT: I have no right to do that without the consent of counsel.

Mr. SWAN: I submit that the only question here is as to the loss under the policy, so I do not think we will ever come to the amount of the valuation.

COURT: Gentlemen, I believe I have covered all I desire to charge you in my general charge with reference to this case. I am
107 requested, however, by counsel upon both sides to charge you upon certain points to which my attention is called in writing, and I do charge you at the request of the plaintiff as follows:

Stranding is one of the perils insured against in the policy, and if the jury find that the stranding was the proximate result of the fog or currents of the lake prevailing, then the owners of the steamer have made a case which entitles them to your verdict in this case. I further charge you as requested by the plaintiff:

That the insurers cannot defend in this case upon breach of warranty as to seaworthiness by reason of this fact that the policy contains no continuing warranty, but if the loss was occasioned by

reason of unseaworthiness I charge you that defendant is entitled to your verdict.

Do you wish, Mr. Moore, that I should go over these requests?

Mr. MOORE: I should prefer you would.

COURT: I charge you, as requested by the defendant, that under the policy of insurance in this case the expense of bringing her to Detroit must be shown by the plaintiff to have been occasioned by the risk against which the defendant had insured the steamer, and if the stranding of said steamer and the expense incurred in effecting her relief resulted from any incompetency of the master or insufficiency of the crew or want of ordinary care and skill in navigating said vessel or for any unseaworthiness of said vessel, then the plaintiff cannot recover, or if the stranding of said steamer and the expense of relieving her was caused by a defective compass by which it was steered, then the vessel was unseaworthy.

108 "There was a want of ordinary care and skill in navigating said steamer and running her at full speed and without a lookout in the dense fog prevailing at the time of her stranding, if the compass by which said steamer was run failed to traverse correctly, either by reason of local attraction caused by the iron hull of said steamer or prevailing in the Lake Superior region, and if the master knew or might have known that the compass had not been adjusted for Lake Superior navigation."

The stranding of said steamer at a point 17 miles out of the course on which said steamer was running in navigating the distance of about 130 miles is *prima facie* evidence that the compass was defective and throws the burden of proving that the compass was correct upon the plaintiff.

I charge you, as requested by the plaintiff in his eighth request, that the jury are entitled to consider the fact that the Spartan had been successfully navigated by this compass during the season up to the time of her stranding, and that on her final trip she had made a good course from Port William to Silver Island and from Silver Island to Passage Island, and that she was upon her usual course when she passed the Quebec, as evidence tending to show that the officers had reason for believing that the compass was a proper one and to rebut the charge that they were negligent in using that compass.

The steamer is presumed to have been seaworthy and that her officers were competent to navigate and manage her, and the insurers are not entitled to a verdict on account of unseaworthiness unless they prove by a preponderance of evidence that she was unseaworthy.

109 But that is to be construed in connection with the charge I gave you that the fact that she ran ashore, on a still night, upon Caribou Island, 17 miles out of her course, raises the presumption of unseaworthiness which it devolves upon plaintiff to explain.

I charge you, as requested by defendant in his seventh request, that under the evidence in this case the burden of proof is upon the plaintiff to show that the stranding of said steamer could not have

been guarded against or prevented by the ordinary exertions of human skill and prudence.

Eighth. The stranding of the vessel, which might have been averted by the exercise of ordinary care and skill, is not a peril of the lakes—that is, that could be averted by ordinary skill; if it could not, then it is not.

Ninth. It was the duty of the master of the Spartan, in the dense fog prevailing before and at the time of the stranding, to take all such precautions for the safe navigation of said steamer as the special circumstances then existing required—that is to say, if the prevalence and density of the fog increased the ordinary dangers of navigation, then, even though he adopted ordinary precautions against disaster which might have been sufficient in clear weather, he was guilty of the lack of ordinary care and skill in navigating said vessel if he failed to take such increased precautions as the increased dangers of navigation required. This was his duty independent of the requirements of the statutes of the Dominion of Canada to which your attention was called.

110 What is ordinary care in clear weather and daylight is not necessarily ordinary care in a dense fog at night.

11th. As the Spartan was violating the statute laws of Canada in running at full speed in a dense fog, the plaintiff must show affirmatively that neither the speed of the steamer nor the defects of the compass could have caused or have contributed to cause the stranding of the steamer.

The burden of proving a loss of this kind is upon the plaintiff. There is no presumption that the loss was caused by the peril insured against by the defendant.

It was the duty of the plaintiff to keep the Spartan in a seaworthy condition for the safe navigation of the waters in which she might be run under the policy. In order to be seaworthy the steamer must have been supplied with a good and reliable compass or compasses, which must have been kept in proper repair and condition for the safe navigation of all waters described in the policy. If there were any defects in the compass known or unknown rendering it unsafe or unsuitable for use in Lake Superior and the stranding of the vessel was caused by, consequent upon, or arose from such defects in the compasses the vessel was not seaworthy for Lake Superior navigation, whatever her fitness for navigation elsewhere, and the plaintiff cannot recover.

Under the terms of the policy in this cause the insurers have not assumed the risk of improper navigation. The phrase "improper navigation" includes both negligent navigation and violation of statutory rules of navigation which govern the Spartan. It is not essential that the damage might have been reasonably ex-

111 pected under the circumstances in which the ship was navigating to constitute negligence. The master was bound to navigate the steamer with due precaution against all disasters that might result from excessive speed in the fog prevailing from errors of the compasses, and was bound to conform the navigation of the steamer to the laws of the Dominion of Canada in evidence in this

cause, and to the usual practice of skillful and careful seamen in like cases.

I charge you, as requested by the plaintiff in his tenth request, that the fact that the second mate was left in charge of the deck during the evening is of no importance in this case.

It is no defense in this case that the master did not himself remain on deck, it being shown that the first mate was in command at the time of the stranding and there being nothing to show that he was not a competent officer.

There is no rule of law which declares it to be a fault for a steamer on the open lake in a fog to run at her usual speed, unless there are other vessels in the vicinity with which she may collide, and there is no proof that there were any. Gentlemen, I will not give any more of these requests. I think I have practically covered them in my general charge, and I think that, having covered all the requests in my general charge and all the questions of law to which it is necessary to direct your attention, without giving any more of these requests, I will leave the case to you, saying:

112 1. If you find that this vessel was stranded by reason of want of ordinary care and skill in her navigation or by reason of a defective compass, the plaintiff is not entitled to recover; on the other hand, if you find that she was stranded by circumstances, by reason of the current or by perils of the sea—any other peril of the sea—then the plaintiff would be entitled to your verdict.

If you shall find for the plaintiff, then if you find that an abandonment was duly made and that the amount of damage done, including the expenses of getting the vessel off and of repairing her, exceeds half the amount insured, then you are at liberty to find a verdict for the sum of ten thousand dollars. On the other hand, if you do not find this abandonment was made or that the loss did not equal the amount named, then you will find a verdict for the plaintiff for the proportion which the defendant is liable to pay as of a partial loss—that is, the proportion of repairs. I think the general average expenses were paid by the insurance, were they not?

The proportion of the cost of the repairs which is chargeable to them in this case.

Gentlemen of the jury, the case is in your hands. You will retire in charge of an officer to consider of your verdict.

113 And thereupon the said plaintiff, by his counsel, excepted to the following instructions given by the judge in his charge to the jury as aforesaid, to wit:

That the purport of the exceptions contained in the policy so far as this case — is that the company does not undertake to insure any loss to this vessel which may be occasioned by incompetency of the master or insufficiency of the crew or want of ordinary care and skill in navigation or any unseaworthiness of any description.

And also to that portion of the charge of said district judge wherein he further instructed the jury as follows:

Now, at the outset of this case we are confronted with the main defense, which is that this vessel was unseaworthy; in other words, that she was not properly equipped for the business in which she was engaged."

And said plaintiff did also except to that portion of said charge wherein the district judge instructed the jury as follows:

"Upon the question of speed I will have a word to say, although it is covered by my general charge; that if you find that the loss occurred by her being navigated with excessive speed there can be no recovery; still, it is for you to judge whether, under all the circumstances of the case, she was navigated at too great a rate of speed."

Said plaintiff also excepted to that portion of said charge wherein said district judge instructed the jury as follows:

"The law of Canada provides that all vessels shall run in a fog at a moderate rate of speed, and I do not undertake to instruct you one way or the other in regard to this fact, but merely to say, in general terms, that if you find the loss was occasioned by the excessive speed of the vessel or by her want of a lookout or by
114 the defect of the compass, the defendant is not liable."

And the plaintiff also then and there excepted to that portion of said charge wherein said district judge instructed the jury as follows:

"With regard to the defective compass the master and crew state in their protest that they attribute the loss to a defective compass, and while that statement is not binding upon the plaintiff and while the plaintiff is not estopped, as we say, or prevented from showing that the loss is attributable to other causes, it is undoubtedly entitled to considerable weight."

And said plaintiff also then and there excepted to that portion of the charge wherein the said district judge instructed the jury as follows:

"In case you shall find, as I said before, that this loss was occasioned by a defective compass the defendant is entitled to your verdict. On the other hand, if you shall find that the loss occurred from a peril of the sea and from no want of skill in navigation and no want of competency in the master or insufficiency in the crew and from no fault on the part of the vessel, your verdict should be for the plaintiff."

And the said plaintiff then and there excepted to so much of the charge of the district judge as instructed the jury as follows:

"I charge you, as requested by the defendant, that, under the policy of insurance in this case, the expense of bringing her to Detroit must be shown by the plaintiff to have been occasioned by the risk against which the defendant had insured the steamer; and if the stranding of said steamer and the expense incurred in effecting her relief resulted from the incompetency of the master or insuffi-
115 ciency of the crew or want of ordinary care and skill in navigating said vessel or from any unseaworthiness of said vessel, then the plaintiff cannot recover; or if the stranding of said steamer and the expense of relieving her was caused by a defective compass by which it was steered, then the vessel was unseaworthy."

The plaintiff also excepted to that portion of said charge in which said district judge instructed the jury as follows:

"I charge you, as requested by the defendant in his 7th request, that under the evidence in this case the burden of the proof is upon the plaintiff to show that the stranding of the steamer could not have been guarded against or prevented by the ordinary exertions of human skill or prudence."

And the plaintiff also excepted to that portion of said charge in which said district judge instructed the jury as follows:

"As the Spartan was violating the statute laws of Canada in running at full speed in a dense fog, the plaintiff must show affirmatively that neither the speed of the steamer nor the defects of the compass could have caused or contributed to cause the stranding of the steamer, and the burden of proving a loss of this kind was upon the plaintiff. There is no presumption that the loss was caused by a peril insured against by the defendant."

And said plaintiff also excepted to the following portion of said charge in which said district judge instructed the jury as follows:

"If there were any defects in the compass, known or unknown, rendering it unsafe for use in Lake Superior and the stranding was caused by or consequent upon or arose from such defects in the compass, the vessel was unseaworthy for Lake Superior navigation, whatever her fitness for navigation elsewhere, and the plaintiff cannot recover.

116 Under the instructions aforesaid the case was submitted to the jury, who thereupon rendered a verdict in favor of the defendant; upon which verdict a judgment was afterwards and on the 8th day of February, 1886, rendered in favor of said defendant.

And because the said several matters, as well as the aforesaid rulings and decisions of said district judge and the exceptions thereto, do not appear of record said district judge has, at the prayer of said plaintiff, signed and sealed this bill of exceptions this 29th day of December, 1886.

HENRY B. BROWN, [SEAL.]
District Judge.

117 Ex. A.

Lake vessel. Ex. R. No. 1965.

Sum insured: $10,000.
Vessel valued at— $50,000.
Rate, 2.70 per cent.
Prem., $270.00.
Policy fee, —.
Particular average, 5 per cent.

By The Boston Marine Insurance Company, on account of The Richelieu and Ontario Navigation Company, loss, if any, payable to assured, do make insurance and cause ten thousand dollars to be insured upon the body, tackle, apparel, and other furniture of the iron steamer called the "Spartan," from noon of the 1st day of May, 1883 (the said vessel being warranted by the assured to be then in safety), to noon of the 30th day of November, 1883, unless sooner terminated or made void by conditions hereinafter expressed.

Warranted by the assured to be employed exclusively in the freighting and passenger business, and to navigate only the waters, bays, harbors, rivers, canals, and other tributaries of Lakes Superior, Michigan, Huron, St. Clair, Erie, and Ontario and River St. Lawrence to Quebec, usually navigated by vessels of her class during the portion of the life of this policy, between noon of April 1st and noon of November 30th; and between noon of November 30th and noon of April 1st ensuing said vessel shall be laid up and safely moored satisfactorily to this company.

The said vessel, tackle, apparel, and other furniture are valued at fifty thousand dollars.

Touching the adventures and perils which the said insurance company is content to bear and take upon itself by this policy, they are of the lakes, rivers, canals, fires, jettisons, that shall come to the damage of the said vessel or any part thereof, excepting all perils, losses, misfortunes, or expenses consequent upon and arising from or caused by the following or other legally excluded causes, viz: Damage that may be done by the vessel hereby insured to any other vessel or property, incompetency of the master or insufficiency of the crew or want of ordinary care and skill in navigating said vessel and in loading, stowing, and securing the cargo of said vessel; rottenness, inherent defects, overloading, and all other unseaworthiness; theft, barratry, or robbery; charges, damage, or loss in consequence of a seizure or detention for or on account of any illicit or prohibited trade or any trade in articles contraband of war; any claim for wages or provisions furnished to officers or crew while the property insured may be detained by any disaster, or during subsequent repairs, excepting always services rendered in protecting, recovering, and securing the vessel or property covered by this policy; anchors being cast without being properly or sufficiently buoyed; gangways and openings through the deck being improperly or insecurely secured or protected.

The assurers hereby acknowledge the receipt of a note, at six months, from May 1st, 1883, for the amount of the consideration of this insurance, which at the rate of 2.70 per cent. on $10,000 is $270.00, less — per cent. off is $——; policy, $——; total amount of note, $——.

In case of loss or misfortune it shall be lawful and necessary to and for the assured, their agents, factors, servants, and assigns, to give the assurers prompt notice of the disaster and submit the plan adopted for recovering and saving the property, and to make all reasonable exertions in and about the defence, safeguard, and recovery of the said vessel or any part thereof, without prejudice to this insurance; and after recovery and the holding of a survey by persons chosen by the insurers and insured or their agents, made under oath, setting forth the particulars of actual damage received by the vessel in the disaster, and discriminating between those and former defects, and wear and tear, the insured are to cause the same to be forthwith repaired, in accordance with the surveyors' specifications; and in case of neglect or refusal on the part of the insured, their agents or assigns, to adopt prompt and efficient measures for

the safeguard and recovery thereof or to repair the same when recovered, then the said insurers may and are hereby authorized to interpose and recover the said vessel, or after recovery to cause the same to be repaired, or both, for account of the insured, to the expenditures and amount whereof the said insurance company will contribute according to the proportion the sum insured bears to the valuation aforesaid, and the surplus (if any) paid or incurred by said insurers (with the premium note if unpaid) shall be a lien upon and shall be recoverable against the said vessel, tackle, apparel, and other furniture or any part thereof, or against the insured, at the option of the insurers; but in case this insurance shall be against total loss only and no claim for the same be sustained, then the whole of such expenditures and amount paid or incurred by said insurers shall be a lien and recoverable as aforesaid, and in all cases of loss or damage one-third new for old shall be deducted from the amount of actual cost of repairs or estimates for same (except on anchors), and no partial loss or particular average shall in any case be paid by the insurers unless the amount of the whole of such damage or loss (after deducting one-third new for old) equals or exceeds 5 per cent. of the valuation aforesaid. Each passage from port to port shall be subject to its own separate average.

Boiler clause.—Unless caused by stranding, collision, or the vessel being on fire, the insured warrants this policy to be free from any claim for loss or damage to boilers, steam-pipes, machinery caused by the bursting, explosion, collapsing, or breaking of the same, and to be free from any and every general average and salvage expense in consequence thereof, excepting always the expenses of getting the vessel from an exposed position to the nearest place of safety, when further expenses of above nature are not to be a claim on these insurers.

It is agreed that the acts of the insured or insurers or their agents in recovering, saving, and preserving the property insured, in case of disaster, shall not be considered a waiver or an acceptance of an abandonment nor as affirming or denying any liability under the policy, but such acts shall be considered as done for the benefit of all concerned and without prejudice to the rights of either party. Further, the insured shall not have a right to abandon the vessel in any case, unless the amount which the insurers would be liable to pay under an adjustment as of a partial loss shall exceed half the amount insured, nor shall detention by the season or by any other cause be alleged or allowed as cause for abandonment. Moreover, no abandonment, in any case whatever, even when the right to abandon may exist, shall be held or allowed as affectual or valid, unless it shall be in writing, signed by the insured, and delivered to the said company or to their authorized agent, nor unless it shall be efficient, if accepted, to convey to and vest in the said insurance company an unincumbered and perfect title to the subject abandoned, and the valuation of said vessel, expressed in this policy, shall be considered the value in adjusting losses covered by this policy.

Losses shall be payable in sixty days after proofs of such loss or damage and of the amount thereof, and proof of the interest of the

assured shall be made and presented at the office of said company (the amount of premium or note for premium on this policy, if unpaid, and all other indebtedness due this company being first deducted).

It is also agreed and understood that in case of loss or damage under this policy the assured, in claiming and accepting payment therefor, hereby and by that act assigns and transfers all his or their right to claim for such loss or damage as against any person or persons to this company, to inure to their benefit, however, to the extent only of the amount of the loss or damage and attendant expenses of recovery paid or incurred by this company; and any act of the assured waiving or transferring or tending to defeat or decrease any such claim against any person or persons shall be a cancellation of the liability of this company for or on account of the loss or damage claimed, and the expenses of recovery or otherwise (if any), paid or incurred by the said company, shall be a lien upon and shall be recoverable against the said vessel, tackle, apparel, and other furniture or any part thereof, or against the insured, at the option of the insurer.

It is also agreed that this policy shall become void if any other insurance is or shall be made upon the vessel interest hereby insured, which, together with this insurance, shall exceed the sum of forty thousand dollars.

Limit of insurance, $40,000.

It is also agreed that all claims under this policy shall be void unless prosecuted within one year from the date of the loss; and in case the notes or obligations given for the premium herefor, or any part thereof, be not paid at maturity, the full amount of premium shall be considered as earned, and this policy becomes void while said past-due notes or obligations or any part thereof remain overdue and unpaid.

It is also agreed that in all cases when carrying grain cargoes in bulk the vessel hereby insured shall have the same secured by good and sufficient shifting boards properly and securely put in place, so as to effectually prevent the shifting of the cargo.

The interests of the assured in this policy or in any part thereof, or in the property hereby insured or any part thereof, is not assignable, unless by consent of this corporation, manifested in writing and in case of transfer or termination of any such interest of the assured or any change of the nature of the insurable interest of the assured in the property aforesaid, either by sale or otherwise, without such consent, this policy shall from thenceforth be void and of no effect, and no assignment or transfer shall in any case relieve the insured or property hereby insured from any or all of the conditions therein expressed, and a violation of or non-compliance with any of such conditions, either by the assignee or by the assignor, before or after the assignment or transfer, shall vitiate the policy.

N. B.—This policy is subject to the usages and regulations of the ports of the Lakes *New York* on all matters of adjustment and settlement of losses not herein otherwise clearly specified and provided

for, to be stated by a competent adjuster of marine losses, designated by the insurers.

In witness whereof the president or vice-president of said Boston Marine Insurance Company hath hereunto subscribed his name and caused the same to be attested by its secretary, but this policy is not valid unless countersigned by the authorized agent of the company at place of issue.

(S'g'd) B. B. FULLER, *President.*

(S'g'd) THOMAS H. LORD, *Secretary.*

Countersigned at Buffalo, N. Y., this 1st day of May, 1883.

(S'g'd) SMITH & DAVIS,
Gen'l Agent-.

[In red ink on left-hand margin:] This policy is free from any loss caused by or on consequence of fire. In case of partial loss under this policy there shall be no deduction of $\frac{1}{3}$ new for old on iron hull.

[In red ink on right-hand margin:] Permitted to assist vessels of their own line in distress, not stranded, and tow them to the nearest available port of refuge.

[Endorsed:] Spartan. No. 1965. Boston Marine Insurance Co. Cash capital, $1,000,000. Steamer Spartan, lake vessel. Richelieu and O. Nav. Co. $10,000 at 2.70 per cent., $270.00; policy, $1.00. Record —; folio —. (S'g'd) Chas. Perry.

117½ The Detroit Fire and Marine Insurance Company hereby consent that the interest of —— —— in the within policy, subject to all the terms and considerations therein mentioned and referred to, be assigned to —— ——, Detroit, —— —, 188–.

—— ——, *Secretary.*

For value received — hereby transfer, assign, and set over unto —— —— all — title and interest in the within policy and all advantage to be derived therefrom, subject to all the forms and conditions therein mentioned and referred to.

Witness — hand- and seal this — day of ——, 188–.

—— ——.

Sealed and delivered in presence of—

—— ——.

The Detroit Fire and Marine Insurance Company.

Capital, $300,000.

Caleb Van Husan, president; M. I. Mills, vice-president.

Directors:

J. S. Farrand,	Detroit.	Samuel P. Williams,	Sturgis.
Wm. A. Moore,	"	E. O. Grosvenor,	Jonesville.
Merrill I. Mills,	"	E. S. Heineman,	Detroit.
Jerome Croul,	"	James Beatty,	"
C. Van Husan,	"	Philip Bach,	Ann Arbor.
Thos. D. Gilbert,	Grand Rapids.	Stephen S. Cobb,	Kalamazoo.
Wm. A. Butler,	Detroit.	George M'Millan,	Detroit.
Alex. Lewis,	"	George B. Pease,	"
W. H. Tefft,	"	Philo Parsons,	"
Frederick Wetmore,	"	John D. Standish,	"

JAMES J. CLARK, *Secretary.*

118 EXHIBIT B.

Proof of Hull Loss.

STATE OF MICHIGAN, } ss:
County of Wayne, }

To the Boston Marine Ins. Co. of Boston:

Be it known that on this 3d day of November, A. D. 1883, before me, James S. Heaton, a notary public duly commissioned and sworn and residing in the city of Detroit, in the county and State aforesaid, personally appeared Alexander Milloy, attorney-in-fact of the Richelieu and Ontario Navigation Company, who, being duly sworn, doth dispose [depose] and say that the following statement and the papers therein referred to and signed with his own hand contain a particular, just, and true statement of loss in the words and figures following, to wit:

I. That on the 1st day of May, A. D. 1883, the Richelieu and Ontario Navigation Company had an insurable interest in a certain steam-vessel called the "Spartan," of Montreal, in the Province of Quebec, as owner.

II. That on the 1st day of May, A. D. 1883, the said company insured the said steam-vessel Spartan against the perils of navigation in the Boston Marine Insurance Company aforesaid under the conditions of hull policy No. 1965, issued by Smith and

119 Davis, general agents of said company at Buffalo, N. Y., in the sum of $10,000, the value of said vessel being fixed at $50,000 in the said policy, and that there was $40,000 insurance permitted on the same as follows:

$10,000 in the Boston Marine Insurance Company.

$10,000 in the Union Insurance Company of Philadelphia.

$10,000 in the Continental Insurance Company of New York.

$7,500 in the Thames and Mersey Marine Insurance Company of Liverpool, London, and Manchester.

$2,500 in the Insurance Company of the State of Pennsylvania.

And $10,000 uninsured, held at the risk of the insured.

III. That the said vessel, in the prosecution of a voyage from Fort William, on the north shore of Lake Superior, in the Province of Ontario, to Owen Sound, on Georgian Bay, in said Province of Ontario, at about 2 o'clock on the morning of the 19th of June last, in a fog, *she* ran ashore on the southwest shore of Caribou Island and became a wreck and total loss, and was duly abandoned by her owners to her insurers, as will appear by certified copy of the protest of her master and mariners, heretofore served upon you; in consequence of which the said Richelieu and Ontario Navigation Company suffered damage, sustained loss or damage within
120 the perils insured against under the said policy No. 1965, to the amount of ten thousand dollars, as will further appear by particular statement herewith.

And the said Richelieu and Ontario Navigation Company claim of the said Boston Marine Insurance Company the sum of $10,000, being the amount of loss sustained by it under said policy No. 1965 aforesaid.

And further says that the said loss or damage did not originate by an act, design, or procurement on said navigation company-part or in consequence of any fraud or evil practice done or suffered by said navigation company, and that nothing has been done by or with its privity or consent to violate the conditions of insurance or render void the policy aforesaid.

Witness my hand, at Detroit, in the county of Wayne and State of Michigan, this 3rd day of November, A. D. 1883. I further state that I am attorney-in-fact and traffic manager of said Richelieu and Ontario Navigation Company; that I make this affidavit & proof for and on behalf and at the request of said Richelieu and Ontario Navigation Company, the owner of said steamer Spartan.

(S'g'd) THE RICHELIEU & ONTARIO NAVIGATION CO'Y,
By ALEX. MILLOY,
Attorney-in-Fact, Traffic Manager.

Subscribed & sworn to before me this 3rd day of November, A. D. 1883.

(S'g'd) JAMES S. HEATON, [L. S.]
Notary Public, Wayne Co., Michigan.

121 [Endorsed:] Copy. Ex. A. Hull proof of loss. Policy No. 1965, Boston Marine Ins. Co. of Boston, on steamer Spartan, owned by Richelieu & Ontario Nav. Co., at — agency. Rec'd Buffalo, Nov. 5, '83. Amount insured, $—; amount claimed, $—; amount paid, $—; date of loss, —— —, 18—; proofs received, —— —, 18—; ordered paid, —— —, 18—; paid, —— —, 18—. ——— ——, agent. NOTE.—Attached to this instrument should be, if total loss, 1, certified copy of protest of the master; 2, last enrollment and

license; 3, bill of sale & abandonment, with subrogation to the company. If partial loss, 1, certified copy of protest of the master; 2, mutual survey & estimation of damage; 3, bill of repairs; 4, subrogation to the company.

122 *By Public Instrument of Protest.*

ONTARIO, } *To wit:*
County of Essex, }

Be it known and made manifest to all whom it doth or shall or may concern that on the ninth day of July, in the year of our Lord one thousand eight hundred and eighty-three, before me, Michael Andrew McHugh, a notary public by royal authority duly appointed in and for the Province of Ontario, residing at the town of Windsor, in the said county of Essex, personally appeared Alexander Murray McGregor, master of the steamer "Spartan," of 678 tons burthen, of the port of Montreal, and brought with him Stephen Wagner and Thomas Estus Harbottle, first and second mates on board of the said steamer "Spartan," and Pasmus Halveron, wheelsman, each of whom did solemnly declare and say as is set out in the hereunder-written declaration—that is to say:

COUNTY OF ESSEX, *To wit:*

We, Alexander Murray McGregor, of the town of Godrich, in the county of Huron, Stephen Wagner, of the town of Sarnia, in the county of Wentworth Lambton, Thomas Estus Harbottle, of the city of Hamilton, in the county of Wentworth, second mate, and Pasmus Halveron, of the town of Owen Sound, in the county of Grey, wheelsman on said steamer "Spartan," do solemnly declare that the said steamer "Spartan" left
123 Fort William at about eight o'clock in the morning of the eighteenth day of June last, and arrived at Prince Arthur's landing at nine and left forty-five minutes past ten, bound down, and reached Silver Island at twenty-five minutes past twelve. We left Silver Island at forty-five minutes past twelve on the same day, passing Passage Island at half past two o'clock in the afternoon. Midway between Silver Island and Passage Island a dense fog arose; passed through channel at Passage Island all right and hauled vessel on her course for White Fish Point; met steamer "Quebec" at half past four o'clock in the afternoon and passed to the southward of her. The fog was still very thick, and the wind was fresh from the northeast. The master, before retiring at eight o'clock in the evening, gave orders to second mate to haul boat a quarter of a point further south to make sure of clearing Caribou Island. The steamer was hauled to the southward, as directed, at once. From the course taken the steamer should have passed seventeen miles to the southward of Caribou Island. She struck upon the southwest point of Caribou Island at twenty minutes past two o'clock in the morning of the nineteenth of June, ran ashore, & filled with water.

As soon as it got light sent a life-boat with mate in charge
124 to Sault St. Marie to procure assistance. The said steamer was properly steered and wheeled.

And I make this solemn declaration conscientiously believing the same to be true, and by virtue of the act passed in the thirty-seventh year of Her Majesty's reign, entitled "An act for the suppression of voluntary and extra-judiciary oaths."

(S'g'd) A. M. McGREGOR.
(") STEPHEN WAGNER.
(") THOS. E. HARBOTTLE.
(") PASMUS HALVERON.

Declared before me, at the town of Windsor, in the county of Essex, severally, by the said Alex'r Murray McGregor, Stephen Wagner, Thomas Estus Harbottle, and Pasmus Halveron, this ninth day of July, A. D. 1883.

(S'g'd) M. A. McHUGH,
Notary Public.

Wherefore I, the said notary, at the request of the said Alexander Murray McGregor, master of the said steamer "Spartan," as well on his own behalf as on behalf of his owners, freighters, officers, and crew, have protested, and by these presents do most solemnly protest, against all and singular the cause & causes operating as aforesaid to the serious detriment of the said steamer "Spartan," her cargo, sails, rigging, and other gearing, or any part or
125 portion thereof, and more especially against the storm and heavy winds and gales, high and dangerous seas, fogs, and defective compass, experienced on her late voyage bound as aforesaid, and for all losses, costs, charges, damages, interest, and expenses whatsoever suffered or sustained for or by reason or means of the facts & circumstances set forth in the foregoing declaration, to be claimed & recovered in time and place convenient, and these presents to serve & avail for that purpose.

In witness whereof I have hereunto set my hand & official seal the ninth day of July, A. D. 1883.

(S'g'd) M. A. McHUGH,
Notary Public.

I, Michael Andrew McHugh, of the town of Windsor, in the county of Essex, a notary public by royal authority, duly appointed in and for the Province of Ontario, do hereby certify that the foregoing is a true copy of the declaration of Alexander Murray McGregor and Stephen Wagner and Thomas Estus Harbottle, mates of the vessel "Spartan," and Pasmus Halveron, wheelsman, taken before me this ninth day of July, A. D. 1883, and now filed in my office.

(S'g'd) M. A. McHUGH,
Notary Public.

125½ [Endorsed:] 7137. The Richelieu & Ontario Navigation Co. *v.* The Boston Marine Insurance Co. Bill of exceptions. Filed Dec. 29, 1886. Walter S. Harsha, clerk.

126 THE UNITED STATES OF AMERICA.

The Circuit Court of the United States for the Eastern District of Michigan.

I, Walter S. Harsha, clerk of the circuit court of the United States for the eastern district of Michigan, do hereby certify and return to the writ of error duly issued on behalf of the Richelieu & Ontario Navigation Company in the case in said court, wherein the said Richelieu & Ontario Navigation Company is plaintiff and The Boston Marine Insurance Company is defendant, and which is hereto attached; that the above and foregoing is a true copy of the record of this court in said cause; that I have compared the same with the original record and it is a true and correct transcript therefrom and of the whole thereof.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at Detroit, in said district, this thirty-first day of January, in the year one thousand eight hundred and eighty-seven, and of the Independence of the United States of America the one hundred and eleventh.

Seal of the Circuit Court, Eastern District of Michigan.

WALTER S. HARSHA, *Clerk.*

127 Supreme Court of the United States.

THE RICHELIEU & ONTARIO NAVIGATION COMPANY, Plaintiff in Error,

vs.

THE BOSTON MARINE INSURANCE COMPANY, Defendant in Error.

Assignments of Error.

And now comes the said Richelieu & Ontario Navigation Company, the plaintiff in error, by F. H. Canfield, its attorney, and says that in the record and proceedings aforesaid and in the judgment aforesaid there is manifest error, in this, to wit:

1. In that the court ruled that no authority was shown on the part of Captain Gibson to bind the defendant in respect to the repairs made upon the steamer "Spartan."

2. In that the court erred in granting the motion of defendant to strike out all the testimony respecting the acts and statements of said Gibson.

3. In that the court erred in excluding the following question put by plaintiff's counsel to the witness Patterson: "Q. What is the custom of Canadian vessels about carrying a lookout forward?"

4. In that the court erred in refusing to instruct the jury according to the first request made by plaintiff's counsel, as follows: "If the jury find that the Spartan, while navigating Lake Supe-

rior on June 19th, 1883, and while a dense fog prevailed, was stranded on Caribou Island, and that the insurers were promptly notified of the disaster, and that proper proofs of loss were furnished to the insurers, then the plaintiff has made a case which *prima facie*
128 entitles it to a verdict in this case."

5. In that the court erred in refusing to instruct the jury according to the second request made by plaintiff's counsel, as follows: "The stranding of the Spartan on Caribou Island while a dense fog was prevailing was an accident which is *prima facie* covered by the policy and for which the insurers are *prima facie* liable."

6. In that the court erred in refusing to instruct the jury according to the 3rd request made by plaintiff's counsel, as follows: "If the jury find that the fog contributed approximately to the stranding of the Spartan, then the insurers are liable for the loss caused by such stranding"

7. In that the court refused to instruct the jury according to the 4th request of plaintiff's counsel, as follows: "There is no evidence in the case which even tends to prove the unseaworthiness of the Spartan except in regard to her compass, and if the jury find that the compass did not vary more than vessels' compasses ordinarily do, and that the steamer had been navigated by said compass without trouble from the time she left La Chine, on the St. Lawrence river, up to the time of the disaster, and that the officers of the steamer at the time she started upon the voyage on which the stranding took place believed the compass to be reliable, and had reason for such belief, then the insurers would not be relieved from liability on account of any supposed defect in the compass."

8. In that the court erred in refusing to instruct the jury according to the 5th request made by plaintiff's counsel, as follows: "If the jury find that the insurers received the notice of abandonment which has been offered in evidence, and that without
129 notice to the owners of the steamer they sent Captain Swain with a wrecking expedition to her rescue, and that Captain Swain brought her to Detroit for repairs, and was paid for so doing by insurers; that the steamer was subsequently surveyed for repairs by the insurers and repaired, and that the owners never interfered with the making of the repairs, then the jury may consider these facts as evidence of an acceptance of the abandonment."

9. In that the court erred in refusing to instruct the jury according to the 6th request made by plaintiff's counsel, as follows: "If the jury find that the insurers, upon receiving notice of abandonment from the owners, sent a rescuing expedition for the purpose of rescuing the Spartan and taking her to a place of repair, and that the Spartan was gotten off by the wreckers and brought to Detroit for repairs and was there repaired without any notice whatever to the plaintiff, and that the plaintiff never interfered with or exercised any control over or made any claim to the steamer after their abandonment, then the jury may consider these facts as evidence tending to prove an acceptance of the abandonment on the part of the insurers."

10. That the court erred in refusing to instruct the jury according to the 7th request made by plaintiff's counsel, as follows:

"If the jury find that the insurers sent the wrecking expedition to the Spartan with the intention of rescuing and repairing her without consulting the plaintiff, then it was the duty of the insurers within a reasonable time to tender her back to the owners free from all liens for such repairs. Their failure to do so is evidence of an acceptance of abandonment and their liability to pay as for a total loss."

130 11. That the court erred in refusing to instruct the jury according to the 8th request made by plaintiff's counsel, as follows:

"If the jury find that the insurers brought the Spartan to Detroit with the intention of repairing her, and that she was subsequently repaired without interference on the part of the plaintiff, and that the insurers failed to pay for said repairs, but allowed the steamer to be libeled and sold by the court of admiralty to satisfy the lien for such repairs without notice to the plaintiff, then this would amount to an acceptance of abandonment."

12. In that the court refused to instruct the jury according to the 9th request made by plaintiff's counsel, as follows: "If the jury find there was an actual or constructive acceptance of the abandonment, then the plaintiff is entitled absolutely to recover as for a total loss."

13. In that the court erred in instructing the jury as follows:

"The law of Canada provides that all vessels shall run in a fog at a moderate rate of speed; and I do not undertake to direct you one way or the other in this regard—that is, the rate of speed—but merely to say in general terms that if you find the loss was occasioned by the excessive speed of the vessel or by her want of a lookout or by the defect of the compass, the defendant is not liable."

14. In that the court erred in further instructing the jury as follows: "With regard to the defective compass, the master and crew state in their protest that they attribute the loss to a defective compass, and while that statement is not binding upon

131 the plaintiff and while the plaintiff is not estopped, as we say, or prevented from showing that the loss is attributable to other causes, it is undoubtedly entitled to considerable weight."

15. In that the court also erred in further instructing the jury as follows: "In case you shall find, as I said before, that this loss was occasioned by a defective compass, the defendant is entitled to your verdict. On the other hand, if you shall find that the loss occurred from a peril of the sea and from no want of skill in navigation and no want of competency in the master or insufficiency in the crew and from no fault on the part of the vessel, then your verdict should be for the plaintiff."

16. In that the court erred in further instructing the jury as follows: "I charge you, as requested by the defendant, that under the policy of insurance in this case the expense of bringing her to Detroit must be shown by plaintiff to have been occasioned by the risk against which the defendant had insured the steamer; and if

the stranding of said steamer and the expense incurred in effecting her release resulted from any incompetency of the master or insufficiency of the crew or want of ordinary care and skill in navigating said vessel, then the plaintiff cannot recover."

17. That the court also erred in further instructing the jury as follows: "I charge you, as requested by the defendant in his 7th request, that under the evidence in this case the burden of the proof is upon the plaintiff to show that the stranding of said steamer could not have been guarded against or prevented by the ordinary exertions of human skill and prudence.

132 18. In that the court also erred in further instructing the jury as follows: "As the Spartan was violating the statute laws of Canada in running at full speed in a dense fog, plaintiff must show affirmatively that neither the speed of the steamer nor the defect of the compass could have caused or contributed to cause the stranding of the steamer, and the burden of proving a loss of this kind is upon the plaintiff. There is no presumption that the loss was occasioned by a peril insured against by the defendant.

19. That the court also erred in further instructing the jury as follows: "If there were any defects in the compass, known or unknown, rendering it unsafe for use in Lake Superior and the stranding of the vessel was caused by or consequent upon or arose from such defect in the compass, the vessel was not seaworthy for Lake Superior navigation, whatever her fitness for navigation elsewhere, the plaintiff cannot recover."

Wherefore the plaintiff in error prays that for the errors aforesaid and for other errors appearing upon the record the said judgment may be reversed.

F. H. CANFIELD,
Att'y for P'ft in Error.

133 UNITED STATES OF AMERICA:

The Circuit Court of the United States for the Eastern District of Michigan.

THE RICHELIEU & ONTARIO NAVIGATION COMPANY, Plaintiffs in Error,
vs.
THE BOSTON MARINE INSURANCE COMPANY, Defendants in Error.

I, Walter S. Harsha, clerk of the circuit court of the United States for the eastern district of Michigan, do hereby further certify and return to the writ of error issued out by The Richelieu & Ontario Navigation Company, plaintiffs in error in the above-entitled cause, that the above and foregoing is a true copy of the assignments of error filed in my office in said cause; that I have compared the same with the original and it is a true transcript therefrom and of the whole thereof.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at Detroit, in said district, this 28th day of June, in the year one thousand eight hundred and eighty-eight, and of the Independence of the United States of America the 112th.

Seal of the Circuit Court, Eastern District of Michigan.

WALTER S. HARSHA, *Clerk.*

134 [Endorsed:] U. S. Supreme Court. Richelieu & Ontario Navigation Co., pl'ff in error, *v.* Boston Marine Insurance Co., def't in error. Assignments of error.

Sup. Court U. S. 1888, Oct'r term. No. 578. The Richelieu and Ontario Navigation Co., pl'ff in error, *vs.* The Boston Marine Insurance Co. Assignment of errors.

[Stamped:] Office Supreme Court U. S. Filed Jun. 30, 1888. James H. McKenney, clerk.

Endorsed on cover: E. Michigan C. C. U. S. No. 296. The Richelieu and Ontario Navigation Company, plaintiff in error, *vs.* The Boston Marine Insurance Company. Filed February 19, 1887.

Supreme Court of the United States.

THE RICHELIEU AND ONTARIO NAVIGATION COMPANY,
Plaintiff in Error,

vs.

THE BOSTON MARINE INSURANCE COMPANY,
Defendant in Error.

Case No. 296, October Term, 1889.

BRIEF FOR PLAINTIFF IN ERROR.

F. H. CANFIELD,
Counsel for Plaintiff in Error.

DETROIT:
John F. Eby & Co., Printers, 65 & 67 West Congress St.
1890.

Supreme Court of the United States

THE RICHELIEU & ONTARIO NAVIGATION COMPANY.
Plaintiff in Error,

vs.

THE BOSTON MARINE INSURANCE COMPANY,
Defendant in Error.

No. 296. Oct. Term, 1889.

BRIEF FOR PLAINTIFF IN ERROR.

This is an action upon a policy of marine insurance. The plaintiff was the owner of the steamer "Spartan," a Canadian vessel of 678 tons burthen, valued at $50,000. In the spring of 1883 she was chartered by the plaintiff to the Owen Sound Steamship Company, and was being run by that company when the loss occurred.

The policy bears date May 1st, 1883, and insured the steamer from April 1st to November 30th, 1883. It declares that "Touching the adventures and perils which "the said insurance company is content to bear and take upon "itself by this policy, they are of the lakes, rivers, canals, "fires, jettisons, that shall come to the damage of said vessel "or any part thereof, excepting all perils, losses, misfor-"tunes, or expenses consequent upon and arising from or "caused by the following or other legally excluded causes,

"viz: Damage that may be done by the vessel hereby insured "to any other vessel or property, incompetency of the master "or insufficiency of the crew, or want of ordinary care and "skill in navigating said vessel, and loading, stowing and "securing the cargo of said vessel, rottenness, inherent "defects, overloading, and all other unseaworthiness; theft, "barratry or robbery." (Rec. pp. 74, 75, etc.)

Besides the policy in suit, the steamer was also insured by the Union Insurance Co., of Philadelphia, the Continental Insurance Co., under similar policies of $10,000 each, and by The Thames & Mersey Marine Insurance Co. for $7,500, and by The Insurance Company of the State of Pennsylvania for $2,500. The uninsured interest being $10,000. The provisions and stipulations of the several policies are the same.

Her route was between Fort William on the north shore of Lake Superior, and the port of Owen Sound, Ontario. She had been on this route from the opening of navigation until the happening of the accident which gave rise to the present suit, and had made three trips.

On June 18th, 1883, the steamer, fully officered and manned, left Fort William for Owen Sound, and while on the voyage, was stranded on the southwest point of Caribou Island in Lake Superior, at about 2 o'clock in the morning of June 19th. The weather during the day previous and up to the time of the stranding was thick and foggy, and the wind was fresh, with "quite a heavy sea."

The officers and crew being unable to get her off, sent notice to the owners or charterers. Notice of the loss was also communicated to the underwriters, who sent a wrecking expedition consisting of the steam tug "Winslow" and a wrecking outfit under the command of Captain Swain, to rescue the steamer.

On June 26th, while the steamer was still aground, the owners gave notice of abandonment to the underwriters by a telegram in the following words:

"Spartan ashore on Caribou Island, and this company beg to inform you that they abandon the boat and claim a total loss. Please inform underwriters."

(Signed) J. N. BEAUDRY,
Sec'y R. & O. Nav. Co.

After receiving this notice of abandonment, the underwriters, without replying to the notice or communicating with the owners, continued their efforts for the release of the steamer, and finally got her off and brought her to Detroit, a distance of several hundred miles from the place of the accident, and a port foreign to the owners. Upon her arrival at Detroit, she was placed in dry dock, and the second day thereafter a survey was held by Mr. Gibson, acting for the underwriters, and Mr. Kirby, who was chosen by the manager of the Owen Sound Steamship Company, the charterers of the steamer (Rec., 35).

The owners took no part in the survey, nor were they consulted in regard thereto.

The work of repairing was commenced by the Dry Dock Company soon after the survey was held. While the repairs were being made, Mr. Crosby, one of the general agents of four of the underwriters having risks on the steamer, who resided at Buffalo, visited the vessel, and directed the master to keep a strict supervision of the repairs.

The bill of the wrecking expedition for rescuing the steamer and bringing her to Detroit in her damaged condition, amounted to $7,455.13, and was paid by the underwriters. The cost of the repairs amounted to about $24,000 (Rec., 35, 36).

"viz: Damage that may be done by the vessel hereby insured "to any other vessel or property, incompetency of the master "or insufficiency of the crew, or want of ordinary care and "skill in navigating said vessel, and loading, stowing and "securing the cargo of said vessel, rottenness, inherent "defects, overloading, and all other unseaworthiness; theft, "barratry or robbery." (Rec. pp. 74, 75, etc.)

Besides the policy in suit, the steamer was also insured by the Union Insurance Co., of Philadelphia, the Continental Insurance Co., under similar policies of $10,000 each, and by The Thames & Mersey Marine Insurance Co. for $7,500, and by The Insurance Company of the State of Pennsylvania for $2,500. The uninsured interest being $10,000. The provisions and stipulations of the several policies are the same.

Her route was between Fort William on the north shore of Lake Superior, and the port of Owen Sound, Ontario. She had been on this route from the opening of navigation until the happening of the accident which gave rise to the present suit, and had made three trips.

On June 18th, 1883, the steamer, fully officered and manned, left Fort William for Owen Sound, and while on the voyage, was stranded on the southwest point of Caribou Island in Lake Superior, at about 2 o'clock in the morning of June 19th. The weather during the day previous and up to the time of the stranding was thick and foggy, and the wind was fresh, with "quite a heavy sea."

The officers and crew being unable to get her off, sent notice to the owners or charterers. Notice of the loss was also communicated to the underwriters, who sent a wrecking expedition consisting of the steam tug "Winslow" and a wrecking outfit under the command of Captain Swain, to rescue the steamer.

On June 26th, while the steamer was still aground, the owners gave notice of abandonment to the underwriters by a telegram in the following words:

"Spartan ashore on Caribou Island, and this company beg to inform you that they abandon the boat and claim a total loss. Please inform underwriters."

(Signed) J. N. BEAUDRY,
Sec'y R. & O. Nav. Co.

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The owners took no part in the survey, nor were they consulted in regard thereto.

The work of repairing was commenced by the Dry Dock Company soon after the survey was held. While the repairs were being made, Mr. Crosby, one of the general agents of four of the underwriters having risks on the steamer, who resided at Buffalo, visited the vessel, and directed the master to keep a strict supervision of the repairs.

The bill of the wrecking expedition for rescuing the steamer and bringing her to Detroit in her damaged condition, amounted to $7,455.13, and was paid by the underwriters. The cost of the repairs amounted to about $24,000 (Rec., 35, 36).

It does not appear expressly who made the contract with the Dry Dock Company for the repairs, but it is claimed by the plaintiff that the evidence shows such facts and circumstances that it will be inferred that she was repaired at the request or by the direction of the underwriters. It does, however, appear that the owners had nothing to do with the repairs (Rec., 46). The Dry Dock Company's bill for the repairs not being paid, that company, for the purpose of enforcing its lien, caused the steamer to be libeled in the District Court for the Eastern District of Michigan, in admiralty, and such proceedings were had upon said libel, that the steamer was subsequently sold to satisfy the Dry Dock Company's lien. Proofs of loss were served upon the underwriters by plaintiff, and subsequently suits were commenced against each of them in the State Court, and all the suits, except the one against the Thames & Mersey, were removed to the U. S. Circuit Court.

The trial of the suit against the Thames & Mersey resulted in a judgement in favor of plaintiff in the State Court, which was subsequently affirmed by the Supreme Court of the State.

See 40 N. W. Rep., p. 758.

In this case the declaration is in the usual form upon the policy. (Rec., p. 3.) The plea is the general issue. (Rec., p. 9), with notice of set-off. At the trial the plaintiff proved the policy (Rec., p. 34), the loss and abandonment; also the action of the underwriters subsequent to the abandonment, insisting that a constructive acceptance was thereby established.

The plaintiff's evidence tended to show, and *prima facie* did show, that the loss was occasioned by reason of perils insured against.

The defense relied upon was unseaworthiness, and negligence in the navigation of the vessel. The unseaworthiness complained of being an alleged defect of the compass; and the negligence complained of was a too high rate of speed at the time of the loss.

The court charged the jury substantially, among other things, that if there were any defects in the compass, known or unknown, or if the steamer was running at full speed in a fog, then the plaintiff could not recover without proving affirmatively that neither the defects of the compass, nor the speed of the steamer, either caused or *contributed* to the stranding.

The plaintiff requested the court to charge the jury, among other things, that the stranding of the Spartan on Caribou Island while a dense fog was prevailing, was an accident which was *prima facie* covered by the policy, and for which the insurers are *prima facie* liable. And also that if the jury should find that the fog contributed approximately to the stranding, then the insurers would be liable for the loss caused by the stranding.

As to the acceptance of the abandonment, plaintiff also requested the court to charge, among other things that if the jury should find that the insurers, upon receiving notice of abandonment, sent a rescuing expedition for the purpose of rescuing the Spartan and taking her to a place of repair, and that the Spartan was gotten off by the wreckers, and brought to Detroit for repairs, and was there repaired without any notice to the plaintiff, and that the plaintiff never interfered nor exercised any control over, or made any claim to the steamer after the abandonment, the jury might consider these facts as tending to prove an acceptance of the abandonment by the insurers.

And upon this point plaintiff also requested the court to charge, among other things, that if the jury should find that the insurers received the notice of abandonment, and without notice to the owners of the steamer, sent Captain Swain with a wrecking expedition to her rescue, and that Captain Swain brought her to Detroit for repairs, and was paid for doing so by the insurers, and that the steamer was subsequently surveyed by the insurers and repaired, and that the owners never interfered with the making of the repairs, the jury might consider these facts as evidence of an acceptance of the abandonment. And further that if the jury should find that the insurers brought the Spartan to Detroit with the intention of repairing her, and that she was subsequently repaired without interference on the part of the plaintiff, and that the insurers failed to pay for such repairs, but allowed the steamer to be libeled and sold for such repairs without notice to the plaintiff, then this would amount to an acceptance of abandonment.

The requests covering these points, as well as plaintiff's other requests, are set forth in the Record at pages 62, 63 and 64.

The court refused to charge the jury in accordance with the requests of the plaintiff, but did instruct the jury, among other things, substantially, that as the steamer was violating the statute of Canada in running at full speed in a dense fog, plaintiff must show affirmatively that neither the speed of the steamer, or the defects of the compass, *could* have caused or *contributed* to the stranding of the steamer.

The charge is given in full at Record, pages 64 to 72, inclusive. Under the charge a verdict and judgment was rendered for the defendant, which we seek to reverse in this court by writ of error.

We claim that the plaintiff is entitled to recover in this suit upon two grounds.

1st. Because the loss was one insured against; and

2d. If the loss is not one insured against by the policy, nevertheless, the evidence, at least, tends to show a constructive acceptance of abandonment which was made after the loss occurred, and therefore the defendant is liable as for a total loss, without regard to the extent of the damage suffered by the steamer, or whether the loss was occasioned by a peril insured against or not.

SPECIFICATION OF ERRORS.

The errors relied upon relate to the rulings of the court in the admission of testimony, and in the charge to the jury, which we specify as follows:

1. The court erred in ruling that no authority was shown on the part of Captain Gibson to bind the defendant in respect to the repairs made upon the steamer.

As already stated, it appears from the Record that upon the steamer's arrival at Detroit, in the survey which was held, Gibson acted for the underwriters. (Record p 35.)

At Record, p 41, it appears that the court asked the following question of Captain McGregor, who was the master of the steamer:

Q. "Captain McGregor, how came you to direct these repairs? Under whose directions were you acting?

A. "Mr. Gibson told me there was no necessity for us both being there; that I could look after the work for the interest of all. Captain Crosby came to me a short time after this conversation with Mr. Gibson, and told me to keep a strict supervision over the work."

And Crosby, himself (see Rec. p. 61), testifies he sent Gib-

son to act on the survey of the Spartan, and afterwards sent him to see that no more repairs were put on the steamer than were called for by the survey.

Parker, the superintendant of the Dry Dock Co., testified (Rec., p. 46) that McGregor had something to do with ordering the repairs, and that Gibson had to do with the repairs. The court ruled (Rec., p. 44) that no authority was shown on the part of Gibson to bind the company. And at Rec., p. 46, it appears that all the testimony respecting the statement of Gibson was stricken out and withdrawn from the jury as incompetent, to which ruling the plaintiff excepted.

2. The court erred in excluding the following question to the witness Patterson :

Q. What is the custom of Canadian vessels about carrying a lookout forward ?

See Rec., p. 47, and third assignment of Error, Rec., p. 83.

Defendant had offered testimony to show that there was no lookout forward at the time of the stranding, besides the mate, who was in command of the deck, and the man at the wheel, and claimed that this was evidence of a want of ordinary care in the navigation of the steamer. The question was asked for the purpose of showing the custom of Canadian vessels in this respect, and that the failure to have a lookout forward did not show a want of ordinary care.

3. The court erred in excluding the record of the suit in Admiralty brought by the Dry Dock Company against the Spartan to enforce its lien for repairing the steamer, which was offered for the purpose of showing the amount due to the Dry Dock Company for said repairs, and also for the purpose of showing that the steamer was sold to satisfy said

decree, and thereby to establish a constructive acceptance of abandonment by the insurers. (See Rec., 53.)

4. The court erred in refusing to instruct the jury according to plaintiff's first request (Record p. 62), as follows :

"If the jury find that the Spartan, while navigating Lake "Superior on June 19, 1883, and while a dense fog prevailed, "was stranded on Caribou Island, and that the insurers "were promptly notified of the disaster, and that proper "proofs of loss were furnished to the insurers, then the "plaintiff has made a case which *prima facie* entitles it to a "verdict.

See 4th Assignment of Errors, Rec., p 83.

5. The court erred in refusing to instruct the jury according to the second request made by the plaintiff's counsel (see Rec. p 62), "The stranding of the Spartan "on Caribou Island while a dense fog was prevailing, was "an accident which *prima facie* was covered by the policy, "and for which the insurers are *prima facie* liable."

See 5th Assignment of Errors, Rec., p. 84.

6. The court erred in refusing to instruct the jury according to the third request made by plaintiff's counsel, as follows (see Rec., p. 63): "If the jury find that the "fog contributed proximately to the stranding of the "Spartan, then the insurers are liable for the loss caused by "such stranding."

See 6th Assignment of Errors, Rec., p. 84.

7. The court erred in refusing to instruct the jury according to the 4th request of plaintiff's counsel, as follows (Rec. p. 63): "There is no evidence in the case "which even tends to prove the unseaworthiness of the

"Spartan, except in regard to her compass, and if the jury "find that the compass did not vary more than vessels' "compasses ordinarily do; that the steamer had been navi- "gated with the same compass without trouble from the "time she left Lachine on the St. Lawrence River up to "the time of the disaster, and that the officers of the "steamer at the time she started on the voyage on which "the accident took place believed the compass to be "reliable, and had reason to so believe, then the insurers "would not be relieved from liability on account of any "supposed defects in the compass."

See 7th Assignment of Errors, Rec., p 84

8. The court erred in refusing to instruct the jury according to the 5th request made by plaintiff's counsel, as follows (Record, p 63): "If the jury find that the insurers "received the notice of abandonment, which has been offered "in evidence, and that, without notice to the owners of the "steamer, they sent Captain Swain with a wrecking expedi- "tion to her rescue, and that Captain Swain brought her to "Detroit for repairs, and was paid for so doing by the "insurers; and that the steamer was subsequently surveyed "for repairs by the insurers and repaired; and that the own- "ers never interfered with the making of the repairs, then "the jury may consider these facts as evidence of an accept- "ance of abandonment."

See 8th Assignment of Errors, Rec., p 84.

9. The court erred in refusing to instruct the jury according to plaintiff's 6th request, as follows (Rec., pp. 63, 84): "If the jury find that the insurers, upon receiving notice of "the abandonment from the owners, sent a rescuing expe- "dition for the purpose of rescuing the Spartan, and taking

"her to a place of repair, and that the Spartan was gotten "off by the wreckers and brought to Detroit for repairs, "and was there repaired without any notice whatever to the "plaintiff, and that the plaintiff never interfered with, or "exercised any control over, or made any claim to said "steamer after their abandonment, then the jury may con- "sider these facts as evidence tending to prove an accept- "ance of abandonment on the part of the insurers."

See 9th Assignment of Errors, Rec , p. 84.

10. The court erred in refusing to instruct the jury according to the plaintiff's 7th request, as follows (Rec., p. 64): "If the jury find that the insurers sent the wreck- "ing expedition to the Spartan, with the intention of "rescuing and repairing her without consulting with the "plaintiff, then it was the duty of the insurers to repair her "within a reasonable time, and tender her back to the "owners free from all liens for such repairs. Their failure "to do so is evidence of an acceptance of abandonment, "and of their liability to pay as for a total loss."

11. The court erred in refusing to instruct the jury according to the plaintiffs 8th request, as follows (Rec., p. 64): "If the jury find that the insurers brought the "Spartan to Detroit with the intention of repairing her, and "that she was subsequently repaired without interference "on the part of the plaintiff; that the insurers failed to pay "for said repairs, but allowed the steamer to be libeled "and sold by a Court of Admiralty to satisfy the lien for "such repairs, without notice to the plaintiff, then this "would amount to an acceptance of abandonment."

See 11th Assignment of Errors, Rec., p. 85.

12. The court erred in refusing to instruct the jury according to plaintiffs 9th request, as follows (Rec., p. 64): "If the jury find there was an actual or constructive "acceptance of abandonment, then the plaintiff is entitled "absolutely to recover as for a total loss."

See 12th Assignment of Errors, Rec., p. 85.

13. The court erred in instructing the jury as follows: "That under the evidence in this case the burden of the "proof is upon the plaintiff to show that the stranding of "said steamer could not have been guarded against or "prevented by the ordinary exertion of human skill and "prudence."

See Rec., p. 70, and 13th Assignment of Errors, Rec., p. 85.

14. The court also erred in charging the jury as follows: "As the Spartan was violating the statute laws of Canada "in running at full speed in a dense fog, the plaintiff must "show affirmatively, that neither the speed of the steamer, "or the defects of the compass, could have caused, or have "contributed to cause the stranding of the steamer. The "burden of proving a loss of this kind is upon the plaintiff.

See Rec., pp. 71, 73, and 18th Assignment of Errors, Rec., p. 86.

15. The court also erred in instructing the jury as follows (Rec., pp. 66, 73): "With regard to the defective "compass, the master and crew state in their protest, that "they attribute the loss to a defective compass; and while "that statement is not binding upon the plaintiff here, and "while the plaintiff is not estopped as we say, or prevented "from showing that the loss is attributable to other causes, "it is undoubtedly entitled to considerable weight."

See 14th Assignment of Errors, Rec., p. 85.

16. The court erred in further instructing the jury as follows:

"If you shall find that the loss occurred from a peril of "the sea, and from no want of skill in navigation, and form "no want of competency in the master or insufficiency in "the crew, and from no fault on the part of the vessel, "then your verdict will be for the plaintiff."

See Rec , pp. 66, 73, and 15th Assignment of Errors, Rec., p. 85.

17. The court also erred in instructing the jury as follows:

"I charge you as requested by the defendant that under "the policy of insurance in this case, the expense of bring- "ing her to Detroit must be shown by the plaintiff to have "been occasioned by the risk against which the defendant "had insured the steamer; and if the stranding of said "steamer, and the expense incurred in effecting her release "resulted in any incompetency of the master or insuffi- "ciency of the crew, or want of ordinary care and skill in "navigating said vessel, then the plaintiff cannot recover."

See 16th Assignment of Errors, Rec., p. 86.

18. The court also erred in charging the jury as follows: "If there were any defects in the compass known or "unknown, rendering it unsafe or unsuitable for use in "Lake Superior, and the stranding of the vessel was "caused by, consequent upon, or arose from such defects "of the compass, the vessel was not seaworthy for Lake "Superior navigation, whatever her fitness for navigation "elsewhere, and the plaintiff cannot recover."

See Rec., pp. 71, 74, and 19th Assignment of Errors, Rec., p. 86.

The exceptions to the refusal of the court to charge as requested by the plaintiff, appear in the Record at page 72, and the exceptions to the charge as given at Rec., pp. 73, 74. The assignments of error which were made a part of the record, appear in the printed Record at pages 83 to 86 inclusive.

The rulings of the court below which are now presented for review, may be considered under two distinct heads:

1st. Those which relate to the cause of the loss.

2d. Those which relate to an acceptance of the abandonment.

In behalf of the plaintiff we submit that the stranding of the steamer at night in a fog, with a heavy sea, was *prima facie* a loss by a peril insured against, and we therefore insist:

I.

THE COURT ERRED IN NOT CHARGING THE JURY IN ACCORDANCE WITH PLAINTIFF'S FIRST, SECOND AND THIRD REQUESTS, WHICH WERE TO THE EFFECT THAT THE STRANDING OF THE SPARTAN ON CARIBOU ISLAND, WHILE A DENSE FOG WAS PREVAILING, WAS AN ACCIDENT WHICH WAS PRIMA FACIE COVERED BY THE POLICY, AND FOR WHICH THE INSURERS WERE PRIMA FACIE LIABLE. AND THAT IF THE FOG CONTRIBUTED PROXIMATELY TO THE STRANDING, THE INSURERS WOULD BE LIABLE.

See Rec., p. 62, 63, and 4th, 5th and 6th Assignments of Error.

Doubtless stranding in a fog is a peril covered by the policy, for which the insurers would be liable; especially if the fog, which is also a peril of the sea, and therefore covered by the policy, contributed to the stranding. But it

will be seen that the court, instead of charging as requested upon this point, instructed the jury, that as the Spartan was violating the statute law of Canada in running at full speed in a dense fog, the plaintiff must show affirmatively that neither the speed of the steamer nor the defects in the compass, could have caused, or *contributed* to cause, the stranding.

See Rec., 71, and 18th Assignment of Error, Rec., 86.

It is clear from the charge given and also from the opinion of the court upon the motion for a new trial (Rec., p. 26, 27), that the court departed from the rule applicable in cases of marine insurance, which regards only the proximate cause of the loss, and according to which, if the proximate cause of the loss was a peril insured against, the underwriters would be liable, although such proximate cause may have been brought into operation by a peril not insured against; or, to state the rule in another form, if the proximate cause of the loss be a peril insured against, the underwriters will be liable, although other perils not covered by the policy may have contributed to bring about the loss.

Columbia Ins. Co., vs. Lawrence, 10 Peters, 507.
Waters vs. Merchants' Ins. Co., 11 Peters, 213.
Peters vs. Warren Ins. Co., 14 Peters, 99.
Orient Ins. Co. vs. Adams, 123 U. S., 67.
General Mutual Ins. Co. vs. Sherwood, 14 How., 351.
Dudgeon vs. Pembroke, L. R., 9 Q. B., 581.
2 App. Cases, H. L., 284.
Lee on Sh. and Ins., 443, 444.
1 Parsons on Marine Ins., 532, 549.
Davidson vs. Burnand, L. R., 4 C. P., 116.
Ionides vs. Universal Ins. Co., 14 C. B., N. S., 259.

The plaintiff's testimony clearly tended to show a loss from perils insured against by the policy.

McGregor, the master (Rec., p 35), testifies to the prevalence of the fog and the heavy sea at the time of the stranding; and that there must have been a strong current to have carried the steamer to the eastward of her course. (Record, p 38.)

There can be no doubt that this testimony was sufficient to show, *prima facie*, that the stranding was due to the fog, the high sea and current of the lake. It is stronger than the testimony which this court held to be sufficient to sustain the verdict in *Union Ins. Co. vs. Smith*, 124 U. S., 405, under a policy identical with the one in this case.

In *Ins. Co. vs. Tobin*, 32 Ohio St., 92, it was held that the insured may not be able, and is not required, to show the exact cause of the loss, but may introduce testimony to show a *probable* cause of loss.

In *Anderson vs. Morice*, L. R., 10 C. P., 58, 11 Eng., 252, a ship whose cargo was insured began suddenly to leak, and sank at her anchors during fine weather. The insured gave evidence tending to show that she had been recently put in repair; that she had been surveyed, and that she had behaved well on previous voyages, and on the voyage to the port where she was lost. No evidence was given of any actual facts as to the cause of the loss, although explanations of it, by way of conjecture, were given by the witnesses. *Held*, that in the absence of any other evidence as to the sinking of the ship, her sinking in smooth water without apparent cause, would create a presumption of unseaworthiness; but when there is other evidence of the condition of the ship, or the cause of the loss, the fact of the ship sinking in smooth water becomes one of several facts which must be

left to the jury, who may properly find that she was lost by a peril insured against, though unable to ascertain, or safely conjecture, what the peril was. Brett, Justice, said that "where there is no other evidence of the condition of the ship, or of the cause of the loss, then the fact of the ship sinking in smooth water becomes one of several facts which must all be left to the jury. If from other facts—such as a large amount of repairs recently done, careful surveys recently made, excellent conduct of the ship up to a time immediately preceding the loss or otherwise, the jury conclude that the ship was seaworthy at the inception of the risk, then the jury may further find that the loss was occasioned by a peril insured against, though unable to ascertain or safely conjecture what it was which caused the ship to sink. The immediate visible cause, in such a case, is the foundering of the ship. If that was not the result of unseaworthiness existing at the *inception* of the risk, it is difficult to see upon the assumption, which is that there is no other evidence as to the loss than the fact of the foundering of the ship, how that could have been caused by anything but some extraordinary, though invisible and unascertained accident of the seas."

While this case is, perhaps, more applicable to the question of unseaworthiness, to be discussed hereafter, to which we also cite it, it is instructive upon the question of negligence in the navigation of the ship, and is inconsistent with the ruling of the court below.

The jury were instructed that the plaintiff, in order to recover, must show affirmatively, that neither the speed of the steamer nor the supposed defects in the compass, could have either caused, or *contributed* to cause, the stranding. This was given without qualification, and under the instruction the verdict must have been for the defendant, although

the jury may have been satisfied that the fog and the currents of the lake, and the heavy sea prevailing, were not only the immediate, but the efficient cause of the stranding. If either the speed of the steamer, or the supposed defects of the compass contributed, or *could* have contributed, no matter how remotely, or how small in degree, the plaintiff, under the rulings of the court, could not recover. And more than this, the burden was cast upon the plaintiff to show affirmatively, that neither the speed of the steamer, nor the supposed defects in the compass, *could* have contributed in any degree to cause the stranding. "Such a construction would render the policy little better than a snare to the insured."

The court, in this connection, further instructed the jury (Rec., 71) that under the terms of the policy, the insurers have not assumed the risk of "improper" navigation; that the phrase "improper navigation" includes both negligent navigation, *and a violation of the statutory rules of navigation;* and that it was not essential that damage might have been apprehended under the circumstances in which the ship was navigated, to constitute negligence. (Rec., 71.)

We submit that the court clearly departed from the rules of law usually applied in cases of marine insurance, and that the departure was not called for by anything contained in the policy, or shown by the evidence in this case.

1. The clause of the policy exempting the underwriters from liability for loss occasioned by want of ordinary care in the navigation of the vessel, does not support the instruction given by the court below, nor will it bear the construction given to it in the charge to the jury respecting the burden of proof.

The language of the policy already quoted, is as follows: "Touching the adventures and perils which the said insur-

ance company is content to bear and take upon itself by this policy, they are of the lakes, rivers, canals, fires, jettisons, that shall come to the damage of said vessel or any part thereof, excepting all perils, losses or misfortunes or expenses consequent upon and arising from or caused by the following or other legally excluded causes, viz: * * * incompetency of the master or insufficiency of the crew or *want of ordinary* care and skill in navigating the vessel," etc.

We submit, that by the true interpretation of this policy the insurers take upon themselves *all* the perils of the lakes, rivers, etc., that may come to the damage of the vessel, and that they are responsible for all losses except those "consequent upon" "arising from" or "caused by" the excepted perils; and if the underwriters seek to defend upon the ground that there was "a want of ordinary care and skill" in the navigation, the burden of proof is with them to show that such want of ordinary care and skill was the proximate cause of the loss.

In *Union Ins. Co. vs Smith*, 124 U. S., 405, the policy was identical with the one at bar, and it was there held that the defendant, having set up in its answer that the loss was occasioned by want of ordinary care in managing the vessel, it was not error to charge the jury that such want of ordinary care must be shown by a fair preponderance of proof on the part of the insurers.

1 Parsons on Marine Ins., 380
1 Phillips on Ins., § 1160.
2 Arnould on Ins., § 1345.

Again, these exceptions are to be construed most strongly against the underwriters, they being the party by whom,

and for whose benefit, the exceptions were introduced into the policy.

Palmer vs Ins. Co., 1 Story, 364.
Ins. Co. vs. Wright, 1 Wall., 468.
Tudor vs New Eng. Ins. Co., 12 Cush., 554.
1 Duer on Ins., 161, § 6.
1 Phillips on Ins., § 1160.

The policy exempts the insurers from liability for loss arising in consequence of a want of *ordinary* care in the navigation of the vessel. The court not only departed from the rule which requires that such exemptions are to be strictly construed, but it went far beyond the exception when it instructed the jury that the insurers had not assumed the risk of "improper navigation." If the phrase "improper navigation" is to be considered synonymous with "want of ordinary care and skill," then the court erred in construing the meaning of those words. Want of ordinary care, does not necessarily include both negligent navigation, and a violation of the statutory rules referred to. These statutory rules, as we shall hereafter show, relate only to cases of collision, and have no application to cases of marine insurance. But the court, in effect, told the jury that it was not only necessary that the steamer must be navigated according to the usual rules of careful seamanship, and with the care which navigators usually exercise, but she must also conform to the statutory rules of navigation.

We submit that the term "ordinary care" means such care as is usually exercised by competent navigators of vessels of the class and of the nationality to which the vessel in question belongs. Want of ordinary care does not necessarily include both negligent navigation and a violation of the statutory rules referred to. These rules are merely arbitrary regulations, and relate only to cases of collision.

But the court, in effect, not only told the jury that the steamer was bound to conform to these statutory rules, but that it was not essential that damage might have reasonably been expected to result from the way in which she was navigated, in order to constitute such negligence as would relieve the insurers from liability. The jury were instructed, substantially, that the insurers would not be liable for the loss, no matter what was the proximate cause, and although the steamer was navigated with ordinary care, provided she failed to conform to the statutory regulations.

Even in actions of tort the negligence of the plaintiff will not defeat his recovery, unless it contributed proximately to his injury.

Beach on Contributory Negligence, pp. 7, 9, 27, and cases there cited.
R. R. Co. vs. Stout, 17 Wall., 657.
Smith on Negligence, 226.

Nor is the rule applicable to common carriers who have negligently exposed the goods intrusted to their care to a peril excepted in their bill of lading, to be applied to cases of marine insurance. A carrier becomes an insurer of the safe delivery of goods, unless prevented by the act of God or the public enemy, or unless the loss results from a cause excepted in the bill of lading. But if the carrier's negligence has exposed the goods to loss from such excepted cause, he is not to be held liable, unless such negligence contributed proximately to the loss.

R. R. Co. vs. Reeves, 10 Wall., 176
Morrison vs. Davis, 20 Pa., 171.
Denny vs. New York Cent. R. R. Co., 13 Gray, 481.
Daniels vs. Ballantine, 23 Ohio St., 532.
Cooley on Torts, 68.

Why should the assured in a case like this be held to a stricter rule than the one applicable to carriers under the decision in 10 Wallace above cited?

The decisions of the Admiralty courts cited by the district judge in his opinion (Rec., p. 27), holding that a violation or a departure from the statutory rules intended to apply in cases of collision, is to be presumed to have contributed to the disaster, have no bearing upon the present case, for the reason that neither those rules nor the doctrine of contributory negligence has any application to the case at bar.

Hoffman vs. Union Ferry Co., 68 N. Y., 385.

The effect of the exceptions named in the policy, does not make the case stronger for the insurers, than it would be if the vessel was "warranted free" from the perils covered by the exceptions. Where the vessel is insured against certain perils, and warranted free from others, if the proximate cause of the loss is one covered by the policy, the insurers are liable, even if the perils from which she was warranted free contributed to bring about the loss.

In *2 Arnould on Ins.*, 808, speaking of loss by capture, it is said that "whether lawful or unlawful, or however made, capture, when the proximate cause of the loss renders the underwriter liable under a policy alleging the loss to be "by capture," though other causes may have been contributory thereto. Thus, even where a capture was concerted between the master of the ship insured and the captor, Lord Ellenborough held that the assured might recover as on a loss by capture, though he might also have recovered on a count for barratry. So, where a ship was driven ashore with only slight damage, on a hostile coast, and there captured, this was held to be a loss by capture, and not by perils of the

sea. At 1342 it is also said: "With regard to losses by perils of the sea, it may be observed generally, that all losses proved to be proximately caused by the wind and waves, by driving against rocks or stranding, etc., though remotely occasioned by the acts and negligence (not amounting to barratry) of the master and crew, will sustain an allegation of loss by perils of the sea; and the same rule holds where the loss, in like cases, is remotely occasioned by barratry, though it is otherwise where barratry is the direct conducing cause of the loss. Where stranding is proved to be the main conducing cause of the loss claimed in the action, it will support an allegation of loss by perils of the sea, though followed by subsequent capture and condemnation."

In *Lowndes on Insurance*, § 122, it is said that "It is now a settled rule of law, established by a long series of decisions, that any loss directly caused by a peril insured against, is to be paid for by the insurers, notwithstanding the loss may have been brought about by bad navigation, neglect, or fault of the master or seamen, or excepting only the fault of the assured himself, any other cause not directly insured against." At § 124, it is said "The same principles "must be applied to cases of partial loss, as where the loss "is total. Latent defect or neglect or fault of seamen, "may have the effect of exposing the ship to damage from "the perils of the seas, from which she would otherwise "have escaped; and if so, the insurer is liable, no matter "apparently, which of the two, latent defect or fault of "the crew, were the remote occasion." At § 125, it is said "When a policy is effected with the exclusion of some particular peril—as for instance, with the clause 'free from all consequences of hostilities'—this has the effect of plac-

ing the excluded peril on precisely the same footing as unseaworthiness, without fault of the assured, under a time-policy; that is to say, when a loss arises from the conjoint operation of a peril insured against, and the peril thus excluded, we are to inquire which of the two was the proximate cause."

In *Dudgeon vs. Pembroke*, L. R. 9, Q. B., 581, 10 Eng., 192, a vessel sailed in an unseaworthy state, and was lost by reason of her unseaworthiness during a storm, which she would have encountered safely if she had been seaworthy. She water-logged and did not readily answer her helm. Partly from this and partly from the thickness of the weather, she went ashore. It was held that the loss was due to the perils of the sea as the proximate cause. This ruling was affirmed by the House of Lords in Law Reports, 2 App. Cases, H. L., 284; 19 Eng., 105. Lord Penzance, delivering the opinion, says that "It must be assumed that "the vessel was not seaworthy, and that its want of "seaworthiness caused it to be unable to encounter successfully the perils of the sea, and so to perish. The question therefore is, in substance, the same as that raised by "the sixth plea, or rather so much of it as the jury found "to be proved, viz., that the vessel 'sailed from London in a "wholly unseaworthy condition in the voyage on which "she was lost,' and that the ship 'was lost, as alleged, by "reason of such unseaworthiness.' For this plea must be "understood to mean, not that the vessel did not perish "immediately by the action of the wind and waves, but "that the loss by these perils of the sea was brought about "by the vessel's unseaworthiness. If a loss, proximately "caused by the sea, but more remotely and substantially "brought about by the condition of the ship, is a loss for

"which the underwriters are not liable, then, quite inde-
"pendently of the warranty of seaworthiness, which applies
"only to the commencement of the risk, the underwriters
"would be at liberty, in every case of a voyage policy, to
"raise and litigate the question whether, at the time the
"loss happened, the vessel was, by reason of any insuffi-
"ciency at the time of last leaving a port where it might
"have been repaired, unable to meet perils of the sea, and
"was lost by reason of that inability. If such be the law,
"the underwriters have been signally supine in availing
"themselves of it." He further says: "A long course of decisions in the courts of this country has established that '*causa proxima et non remota spectatur*' is the maxim by which these contracts of insurance are to be construed, and that any loss caused immediately by the perils of the sea, is within the policy, though it would not have occurred but for the concurrent action of some other cause which is not within it."

The application of the maxim for which we contend, of course may operate in favor of the insurers, and against the insured, where the proximate cause of the loss is a peril not covered by the policy.

In *Cory vs. Burr*, L. R. 9, Q. B. D., 463, the risk and losses insured against included perils of the sea, barratry of the master and mariners, and all other perils, etc., but the ship was warranted "free from capture and seizure, and the consequence of any attempt thereat." By reason of the barratrous conduct of the master in smuggling, the vessel was seized by Spanish revenue officers and condemned. It was held that although the seizure was brought about by the barratry of the master, still the *proximate* cause of the loss was the seizure, and that the insurers were not liable-

This ruling was affirmed by the House of Lords, L. R., 8 App. Cases, H. L., 393; 35 Eng., 743. Lord Blackburn in his opinion, says: "If it had not been that the Spanish "revenue officers, doing their duty, had come and seized "the ship, the barratry of the captain in coasting along there, "hovering, as we should call it, along the coast, in order that "the small smuggling vessel might come and take the "tobacco, would have done the assured no harm at all. The "underwriters do undertake to idemnify against barratry; "they do undertake to idemnify against any loss which is "directly sustained in consequence of a barratry; and in this "case, as I said before, I think the seizure was as direct a "consequence of barratry as could well be. But still, as Mr. "Justice Field says, it was the seizure which brought the "loss into existence—it was a case of seizure."

In *Wilson vs. The Owners of the Cargo, per The "Xantho,"* L. R. 12 App. Cases, H. L., 503, the action was to recover for goods lost by reason of a collision. The defense claimed that the collision was one of perils of the sea, which were excepted by the bills of lading. In the opinion delivered by Lord Herschell it is said: "In the "case of a marine policy the *causa proxima* alone is "regarded. If that which immediately caused the loss was "a peril of the sea, it matters not how it was induced, even "if it were by the negligence of those navigating the ves-"sel." He quotes approvingly the opinion of Willes, J., in *Grill vs. Gen. Iron Screw Collier Co.*, L. R. 1 C. P., 600, where he says that "A policy of insurance is an absolute "contract to idemnify for a loss by perils of the sea, and it "is only necessary to see whether the loss comes within the "terms of the contract and is caused by perils of the sea; "the fact that the loss is partly caused by things not dis-

"tinctly perils of the sea, does not prevent its coming "within the contract. In the case of a bill of lading it is "different, because there the contract is to carry with "reasonable care, unless prevented by the excepted perils." Lord Bramwell said: "The Court of Appeal, with great "respect, argued as though the collision caused the loss. "So it did, in a sense. It was a *causa sine qua non*, but it "was not *causa causans*. It was *causa remota*, but not "*causa proxima*."

In *Hamilton vs Pandorf*, L. R. 12 App. Cases, H. L., 518, the action was to recover injuries to a cargo of rice. During a voyage rats gnawed a hole in a pipe, and through this hole sea water entered and damaged the rice. *Held*, that the damage was within the exception of perils of the seas, and that the ship owners were not liable. The proximate cause of the damage being the sea water, and not the gnawing of the rats. Lord Watson, in his opinion, says: "If the respondents were preferring a claim "under a contract of marine insurance, expressed in ordin- "ary terms, I should be clearly of the opinion that they "were entitled to recover, on the ground that the loss was "occasioned by a peril of the sea within the meaning of "the contract. When a cargo of rice is directly injured "by rats, or by the crew of the vessel, the sea has no share "in producing the damage, which in that case, is wholly "due to a risk not peculiar to the sea, * * * But in "the case where rats make a hole, or where one of the crew "leaves a port hole open, through which the sea enters and "injures the cargo, the sea is the immediate cause of "mischief, and it would afford no answer to the claim of "the insured to say that, had ordinary precaution been "taken to keep down vermin, or had careful hands been

"employed, the sea would not have been admitted and "there would have been no consequent damage."

Lord Bramwell said: "It is true that rats made the hole "through which the water got in, and if the question were "whether rats making a hole were a peril of the sea, I "should say certainly not. If we could suppose that no "water got in, but that the assured sued the underwriter "for the damage done to the pipe, I should say clearly that "he could not recover. But I should equally say that the "underwriters on goods would be liable for the damage "shown in this case."

Lord Fitzgerald said: "The remote cause was in a certain "sense the action of the rats on the lead pipe, but the "immediate cause of the damage was the irruption of sea "water from time to time through the injured pipe caused "by the rolling of the ship as she proceeded on her "voyage."

And Lord Herschell said: "I entertain no doubt that the loss was one which would in this country be recoverable under a marine policy as due to a peril of the sea. It arose directly from the action of the sea."

Davidson vs. Burand L. R., 4 C. P, 117.
West India Telegraph Co. vs. Home, &c., Ins. Co., L. R. 6, Q. B. D., 51.
Livie vs. Jansen, 12 East, 647.

The instruction of the court is not to be sustained by reason of the Canadian statute referred to by the District Judge, being chapter 29, 43 Vic., certain provisions of which are set forth at page 61 of the Record. This statute was intended to provide certain regulations to prevent collision, among which is the following:

Article 13—Every ship, whether a sailing ship or a

steam ship, shall in a fog, mist or falling snow, go at a moderate speed.

These regulations, or statutory rules, correspond with our own statutory rules prescribed by Congress to prevent collision at sea. (U. S. Rev. St., sec. 4233.) And Article 13 above quoted, is substantially the same as Rule 21 of our statute, and is identical with the present rule respecting speed of vessels in a fog, contained in the act of Congress, approved March 3d, 1885. (See Article 13 of that act.)

Now, these statutory rules, or similar rules, have existed for many years in this country, as well as in England and other maritime countries. They are known as the International rules.

The Scotia, 14 Wall., 71.

They were intended as regulations to prevent collisions at sea, but not to apply to cases of maritime insurance.

The provisions of the Canadian statute are nearly identical with the regulations perscribed by the British Merchants' Shipping Act, which were not intended to apply to cases of insurance, or to limit the liability of insurers, or to apply to any collateral issues, but only in cases of collision.

In *Grill vs. Iron Screw Collier Co.*, L. R. 1., C. P., 600, which was an action by shippers against the owners of a steamer for a loss of goods, Willes, Justice, page 611, says, "The act was not passed to decide cases such as that now before us, but to regulate ships and rights of ship owners *inter se*." And Smith, Justice, said: "The whole scope of the act shows there was no intention on the part of the legislature to alter the effect of contracts made between ship owners and shippers, and to relieve the former of any of their liability. And in the same case on appeal, in the

Exchequer Chamber, L. R., 3 C. P., 478, Bramwell, B., said that the "*act was not meant to apply to a collateral issue; but only where the question of collision is in issue.*"

The same construction should be given to the Canadian statute, which seems to have been copied from the British statute.

In *The Pennsylvania*, 19 Wall., 123, it was said by this court, of the rule requiring steamships, when in a fog, "to go at moderate speed," that the purpose of the requirement was "to guard against danger of collisions."

If it was intended that these statutory rules should be incorporated into this policy, why is it not so stipulated?

What is ordinary care in a case like this is a question of fact for the jury, to be determined by the evidence as to the manner in which such steamers are ordinarily navigated. And whether there was a want of ordinary care in navigating the Spartan at her usual speed upon the broad lake—with no other vessel in the vicinity, simply because a fog prevailed, was a question for the jury. And so the court treated it in the first part of his charge (see Rec., 66), where he said to the jury: "It is for you to judge, whether under all the circumstances of the case, she was navigated at too great speed. Now, it strikes me, but the question is one for your determination, that a vessel is not under obligation while on the open lakes to slacken her speed because of a fog, unless there is some reason to apprehend collision with another vessel, or unless the vessel is so near the shore that she might run upon it, unless she was navigated at a less rate of speed. And if this compass had been a proper compass, and there was no reason to think it was otherwise, I should feel loth myself to charge the vessel with fault on account of excessive speed. On the other

hand, if this compass were known to the captain, or he had good reason to believe, it was defective, it would strike me that in passing the neighborhood of Caribou Island, he should have directed the speed of the steamer to be slowed. But as I said before, gentlemen, this is a question for your consideration."

We insist, and shall hereafter argue, that there is no testimony in the case which shows that the captain had reason to believe that the compass was defective. On the contrary, he had every reason to believe from his experience that the compass was sufficient and proper.

If the court had left the case to the jury upon the instruction last above quoted, it is probable that no error would have been committed upon this point. But the court subsequently (see Rec., 70) changed its instruction, and charged the jury as a matter of law, that there was a want of ordinary care and skill in navigating the steamer, and running her at full speed without a lookout in a fog, if the compass, by which the steamer was run, failed to traverse correctly, either by reason of local attraction caused by the iron hull of the steamer, or prevailing in the Lake Superior region; if the master knew, or might have known, that the compass had not been adjusted for Lake Superior navigation.

This direction, we submit, goes to the extreme verge of the law, and beyond it. But the court went still further in saying to the jury that it was "not essential that damage or danger might have been reasonably expected under the circumstances in which the ship was navigated, to constitute negligence." This, in effect, was an instruction, that although there was no reason to anticipate danger from the manner in which the ship was navigated, either on account of her speed or any other circumstance then existing, still

there would be negligence or a want of proper navigation, and if damage did result the insurers would not be liable if there was a want of conformity to the statutory rule as to speed.

This, we submit, was error. If the master of the vessel had no reason to expect damage or danger from the way in which the ship was navigated, or "from the circumstances" then existing, how can it be said, as a matter of law, that he was guilty of negligence or a want of ordinary care in the navigation of the ship? If an experienced and competent master upon the deck of his vessel, has no reason to expect danger or damage from stranding, or otherwise, from the manner in which the ship is navigated, how can it be said, as a matter of law, that he was negligent in navigating the ship in that manner?

As already stated, the question of negligence in regard to the speed of the steamer was for the jury. It was not a question of law under any of the facts or circumstances of the case.

II.

THE COURT ERRED IN CHARGING THE JURY THAT "UNDER THE EVIDENCE IN THIS CASE THE BURDEN OF PROOF IS UPON THE PLAINTIFF TO SHOW THAT THE STRANDING OF THE STEAMER COULD NOT HAVE BEEN GUARDED AGAINST OR PREVENTED BY THE ORDINARY EXERTIONS OF HUMAN SKILL AND PRUDENCE."

See 12th Specification of Error and 13th Assignment of Errors, Rec., p. 86.

We claim this to be erroneous for two reasons:

1st. Because it puts the burdon of proof upon the wrong

party. As already shown, but for the exceptions in the policy, negligence on the part of the officers and crew would be no defense. And under the decision of this court in *Union Ins. Co. vs. Smith*, 124 U. S., 405, already cited, the burden is with the *defendant*, if it seeks to bring itself within the exception of a want of ordinary care in the navigation of the vessel, "to establish negligence by a fair preponderance of proof."

2. There is nothing in the law of marine insurance even under such a policy as this, which relieves the insurer from liability, although the insured may have failed to use all ordinary skill and prudence to prevent disaster. Unless the want of such skill and prudence was the *proximate* cause of the loss, it would be no defense.

III.

AS TO THE DEFENSE OF UNSEAWORTHINESS.

The charge of unseaworthiness made against the Spartan, relates to her compass. The only evidence upon this point is the statement appended to the protest (Rec., pp. 81, 82, to which we will refer hereafter) and the following testimony:

Captain McGregor, the master, Rec., p. 37, on cross-examination, testified as follows:

Q. To what do you attribute the stranding?
A. Either to the currents or the defects of the compass.
Q. What was the matter of the compass?
A. Nothing that I know of, or I should not have run her.
Q. It was defective, was it?

A. It was more or less; it was running in opposite courses.

Q. That was what you stated, was it not, that her compass was defective?

A. Yes, I did.

Q. Did you attribute the loss to any of her officers or crew?

A. No.

Q. When that protest was signed, you had those words inserted, did you not, "Fogs and defective compass"?

A. Yes, sir.

Q. You think the loss was occasioned by a defective compass or fogs?

A. Yes, sir.

Q. You have always attributed that loss to the defective compass?

A. Yes, sir, and the current.

At page 38 he testifies that the Spartan had made two trips previous to the disaster, and was then on her third trip; that he had been a pilot on Lake Superior ever since 1857, and was familiar with the route.

Q. Did you use the same compass on your previous trips?

A. Yes, sir, there were three compasses on her, two spirit compasses and one brass compass.

Q. Had you experienced any difficulty, as far as the compasses were concerned, on your previous trips?

A. No more than we generally do on iron vessels; there was about the usual variation. I had charge of the deck from the time we left Ft. William to 8 o'clock in the evening.

Q. The compass gave you no trouble?

A. No, sir. After meeting the Quebec, after passing Passage Island, she was to the eastward of us, which further confirmed me that our course would take her clear, and that she would be a long distance past Caribou Island.

Q. State whether you met the Quebec the usual distance?

A. We expected to meet the Quebec; I supposed it was her; we were only a short distance off; the fog was low and I could see her topmast as we passed.

Q. Mr. Swan asked you yesterday, I think, showing you a copy of the protest, and in your answer you said you

thought the stranding was due to the fog and current. You also spoke in regard to the variation of the compass?

A. There must have been a very strong current to have gotten us so far to the eastward.

Q. About how much did that compass vary?

A. It would not vary from some of my old compasses on other vessels; another compass on that vessel might be just the same, and different on wooden vessels.

Q. You say you went to your room at eight o'clock; up to that time had there been any trouble on account of the compass?

A. No, sir; she came through Passage Island all right. I may state that two hours afterwards we met the Quebec. She was to the eastward of us a quarter of a point, which ought to have taken us still further to the westward of Caribou Island.

Q. So far as your own knowledge is concerned, Captain, what do you know of the defects of the compass contributing to the stranding of the vessel?

A. I cannot account for the loss in any other way; it might have been a very strong current instead of the compass altogether. This was an old compass we had used for some years. We used it all the way from Montreal up to Lachine.

Q. (By the Court.) Had you discovered any defect in the compass before?

A. I would not say there was any defect in it at all; nothing further than the attraction in any iron vessel.

Q. So far as your examination was concerned, had you ever discovered any defect?

A. From the appearance of the compass it was all right.

Q. As far as appearances presented themselves, was it defective?

A. In no way, so far as I could see. I could not account for the loss in any other way, unless there was something in that.

Q. You say you cannot account for it in any other way except that and the strong current?

A. No, sir.

Q. Suppose there had been no fog?

A. She would not have got on; we would have seen the Island. On cross-examination (Rec., 39), he says that he

had noticed that there was little variation in the compass. That there were currents there between Passage Island and White Fish Point.

Q. Practically, the stranding was due to the compass, was it not, and not to the currents.

A. I did not say that.

Q. If there was no current, what was there to take her out of her course?

A. I cannot account for it.

Q. Must it not be attributed to the compass?

A. Either that or some other cause aboard the vessel.

Q. You mean attraction by the hull of the vessel?

A. Yes, sir.

On re-direct examination (Rec., 40), he testified that all compasses on Lake Superior vary more or less at different points. There is one point in Nepigon Channel where it would vary a point and three-quarters in three miles. It will turn right around and come back to the same course again. That is due to minerals, to attractions on the shore. The variation differs with the direction or course the vessel is running.

At page 41, he further testifies:

Q. You took this boat from the St. Lawrence, you brought her from there?

A. Yes, sir.

Q. You brought her across Lake Ontario?

A. Yes, sir.

Q. Did you at any time on your way up, have any trouble with the compass?

A. No, sir.

Q. How much of the time after you left Owen Sound on your first trip, up to the time of the collision, were you troubled with fogs that season?

A. Very much; nearly every trip.

Q. Did you, up to the time of the disaster, have any trouble in making the Spartan run a good course?

A. No.

He then testified as to the navigation of the boat on previous trips by these compasses, and in regard to the voyage on which the accident occurred. At page 42 he testified as follows:

Q. On your way down, your first point was Silver Island?

A. Yes, sir.

Q. What is the distance from Fort William to Silver Island?

A. From Pt. Arthur to Silver Island is about 24 miles.

Q. What is the course from Silver Island to Pt. Arthur?

A. We stopped at Silver Island.

Q. How did the compass carry you?

A. Carried us all right.

Q. What is the next point?

A. From Silver Islet to Passage Island, a distance of about 20 miles. On the usual course we would pass that point about half or ¾ mile to the westward.

Q. How did you pass it this time?

A. We passed it about that distance off; it was thick when we passed; we could not see the Island, but I heard the bell. I have frequently passed there in other boats. From Passage Island we steered for White Fish Point. We expected to meet the Quebec, and of course they were blowing their fog whistle and we were blowing ours, and by going on top of the pilot house we could see their masts just to the eastward of us. The distance from Passage Island to Caribou Island is about 132 miles.

At Rec., p. 45, he testifies that the current may have caused the stranding.

By the Court.

Q. How long had you been using this compass?

A. All the time from the time she came out. We started from LaChine on the 14th of May; this was her third trip.

Q. Did you discover any defects in the compass on former trips?

A. A little different from other vessels; for instance, the Chicora was very much different.

Q. Had you discovered the compass was defective?

A. No, I don't know now it is defective; I could not account for her getting ashore in any other way, only by the current or on account of being badly steered.

By Mr. Swan.

Q. What trip was it you found the compass out?

A. That was in the other channel; every vessel I was on varied there in the same place.

Q. But of course a compass on an iron vessel will vary more?

A. I say it don't make any difference, a compass will swing from a point to a point and three-quarters in the same place in passing Flower Isle. (Rec., 46.) I have tested it in the Cumberland, the Chicora, the Francis Smith, and on this boat.

Q. Didn't you, in your examination in chief, testify this way: When you were asked what you supposed the cause of the loss was, you said: "I think the loss was occasioned by a defective compass"?

A. I don't think so; it was a mistake if I did; I merely gave it as a supposition that such was the case.

Now the master testifies to no facts which show that the compass was defective, or that the stranding was due to the compass. At the most, he only testifies to a theory, a "supposition," or to an opinion formed after the event, and his theory or "supposition" is that the stranding may have been caused by a strong current, the heavy sea, *or* a defective compass.

Captain Francis Patterson, Rec., pp. 47, 49, testifies that he steered the steamer Spartan with this same compass from Owen Sound as far as Lonely Island and from there to Cape Smith, during a dense fog, and that no difficulty was experienced with the compass. During that time the course of the vessel was changed three times, and she was run entirely by the compass. Did not see any objection to the compass any more than other compasses I have used for years in other vessels. All that I could find was that the compass was a little dull, a little slow in its movements. He also testified that compasses are likely to vary in Lake Superior, on account of local attraction.

Wagner, the mate, defendant's witness, testified (Rec., p. 56) that he supposed the compass was a reliable one; it was a little out; it was a good deal like many others, a little out.

Q. What do you mean, that it varies?

A. They all vary up there; those that have not been adjusted; they vary more at certain points than others.

It appears that the Spartan had been navigated, up to her last voyage, without difficulty, in all sorts of weather; having run nearly 4000 miles, and her conduct had been excellent up to a time immediately preceding the loss. No trouble had been experienced in her making a correct course. These facts, in connection with the testimony in regard to the wind and current prevailing at the time of the loss, would have been sufficient to have justified the jury in finding that the loss was due to a peril insured against.

It should not be forgotten that the policy of insurance in this case was a *time* policy, and that there is no warranty of seaworthiness in a time policy. If the vessel was seaworthy at the time the policy was issued, no subsequent unseaworthiness would effect the liability of the insurers.

Barber on Ins., 263.
Thompson vs. Hopper, 6 Ell. & B., 171.
Lee on Ins., 410.
Merchants Ins. Co. vs. Morrison, 62 Ill., 242.
Gibson vs. Small, 24 Eng. L. & Eq., 17.
Dudgeon vs. Pembroke, L. R., 9 Q. B., 581.

The record shows, beyond all question, that the steamer was seaworthy when the policy was issued. She had been navigated by the same compass during the entire season up to the time of the loss. From Lachine, on the St. Lawrence River, she had been navigated to Owen Sound.

From Owen Sound she had made three trips on her regular route to Port Arthur, running as well by night as by day, encountering much fog, but experiencing no difficulty whatever from the compass. The owner of an appliance or a vessel which has been known to operate safely and satisfactorily in a variety of circumstances, may continue to use it without subjecting himself to the charge of negligence simply because an accident occurs subsequently, he being in ignorance of its actually having become defective. This is a proposition sustained by good sense and judgment, and is recognized by the authorities.

Burke vs. Witherby, 98 N. Y., 306.
Loftus vs. Ferry Co., 84 N. Y., 455.
Cleveland vs. New Jersey, 68 N. Y., 306.
Dougan vs. Champlain, 56 N. Y., 1.

We submit, therefore, that the court erred in charging the jury (see Rec., 71) that "If there were any defects in the compass, known *or unknown*, rendering it unsafe or unsuitable for use in Lake Superior, and the stranding was caused by, consequent upon, or arose from such defects in the compass, the vessel was not seaworthy for Lake Superior navigation, whatever her fitness for navigation elsewhere, and the plaintiff cannot recover."

See 19th Assignment of Errors, Rec., 86.

Under the evidence, the case is not brought within the exception relating to "inherent defects" and unseaworthiness. The language of the exception is, "Excepting all perils, losses, misfortunes or expenses, consequent upon the arising from or caused by the following or legally excluded causes * * * * rottenness, "inherent defects, over-loading and all other unseaworthiness."

It cannot be said, under the evidence, that the supposed defect of the compass was an "inherent" defect.

A compass which had carried the vessel safely over more than four thousand miles by day as well as by night, through fogs as well as in clear weather, cannot be said to be *inherently* defective, simply because it may have deviated on the last voyage.

The term "inherent" (see *Worcester's Dictionary*) means:

"1. Existing inseparably in something else."

"2. Implanted by nature; not adventitious; naturally pertaining to. What is purely natural; not artificial or acquired."

The compass in this case may possibly have varied or deviated during the voyage, from some local or accidental cause, but it by no means follows that it was "naturally" or "inherently" defective.

Nor is the case affected by the words "All other unseaworthiness."

First, Because of the rule *ejusdem generis;* and

Second, This being a time policy, there is no warranty of seaworthiness. If the vessel was seaworthy at the time the policy was issued, no subsequent unseaworthiness would effect the liability of the insurers; certainly no unseaworthiness which occurred during the progress of the voyage on which the accident happened, would release them from liability.

Barber on Ins., 263.
Thompson vs. Hopper, 6 Ell. and B., 171.
Lee on Ins, 410.
Merchants' Ins. Co. vs Morrison, 62 Ill., 242.
Gibson vs. Small, 24 Eng. L. & Eq., 17.
Dudgeon vs. Pembroke, L. R., 9 Q. B., 581.
West India Tel. Co. vs. Home & Col. Ins. Co., L. R., 6 Q. B. D., 57.
American Ins. Co. vs. Ogden, 20 Wend., 287.
Adderly vs. American Ins. Co., Taney's Dec., 126.

In *Dudgeon vs. Pembroke*, above cited, the vessel became water-logged and went ashore in a storm, and was lost. But for her unseaworthiness, she would have outrode the storm safely; and yet it was held that unseaworthiness was no defense, the owners being ignorant of her condition when the voyage was commenced.

And the error of the court in charging, as stated in the 13th specification of errors, is, under the facts of the case, even more apparent.

The effect of the charge, as a whole, is to incorporate in a time policy a warranty of seaworthiness, which does not exist in time policies, not only at the time when the policy issued, and when the last voyage was commenced, *but during every moment of the voyage*. So that, although the compass may have proved sufficient upon all her prior voyages, and may have guided the vessel with unerring correctness up to the time of the loss; and although the master may have believed, from his past experience with it, that it was entirely safe, and although it may have become defective by reason of some accidental cause during the voyage upon which the loss occurred; or may have been made to deviate by some local cause, or local attraction peculiar to Lake Superior, the insurer would be discharged. If this be the law, insurers "have heretofore been singularly supine in availing themselves of it."

Union Ins. Co. vs. Smith, 124 U. S., 427.

And, as we have already argued, the court also clearly erred in charging the jury that under the *Canadian statute* the plaintiff could not recover unless they *proved affirmatively* that the defects of the compass neither caused or contributed to the stranding. In the absence of any statutory

provision applicable, such an instruction would certainly be error. The Canadian statute contains no reference to compasses, and therefore is not applicable.

IV.

AS TO THE RULING OF THE COURT UPON THE ADMISSION OF EVIDENCE.

1. The court erred in admitting the protest in evidence, and in instructing the jury as follows: "With regard to "the defective compass, the master and crew state in their "protest that they attribute the loss to a defective compass; "and while that statement is not binding upon the plain- "tiff, and while the plaintiff is not estopped, as we say, or "prevented from showing that the loss is attributable to "other causes, it is undoubtedly entitled to considerable "weight."

See 14th Specification of Errors.

It will be seen that the protest itself, as signed by the master and crew, nowhere refers to the compass. The only reference to it being in the declaration of the Notary (see Rec., p. 82), in which the following language is used: "Wherefore I, the said notary, at the request, &c., have "protested, and by these presents do solemnly protest "against all and singular, the cause and causes operating as "aforesaid to the serious detriment of said steamer Spartan, "her cargo, &c., and more especially against the storm and "heavy winds, currents, high and dangerous seas, fogs, and "defective compass, experienced on her late voyage, bound "as aforesaid, &c."

Now this declaration of the Notary is not competent evidence against the plaintiff. And even if the master, as will be claimed, directed that the words "defective compass" should be inserted in the declaration of the Notary, there is still nothing to show that the crew indorsed the statement, nor to justify the statement of the court that the master and crew attributed the loss to a defective compass. At all events, they did not attribute the loss to a defective compass any more than they attributed it to "the storm, heavy winds and gales, high and dangerous seas, and fogs experienced on the voyage." And the statement of the court that they attributed the loss to a defective compass alone, was prejudicial to the rights of the plaintiff.

2. The protest was not admissible in evidence. It was made more than three weeks after the loss, and was therefore not a part of the *res gesta*. It was a mere narrative or statement by the master and crew of the voyage, or that portion of it immediately connected with the disaster. If it had been made by the owner himself, it would have no other effect as evidence than a mere admission; and being made by the master, it amounts to nothing more than his admission, and is to be governed by the same rules which govern the admissibility of admissions made by other agents.

In *Christian vs. Combe*, 2 Esp., 490, Lord Kenyon said that a protest is inadmissible as evidence in chief. It may be read to contradict the evidence which the captain who made it may have given at the trial, but under such circumstances only.

2 Arnould on Ins., 1353, says: "The protest of the captain, so long as he is living, is in no case evidence on the one side or the other; the only use that can be made of it

is to contradict his testimony if he vary from it; it cannot be adduced to disprove the grounds of the condemnation of a foreign prize court; nor will the brokers, having shown it to the underwriters with other papers relating to the loss, on demand of payment, make it evidence as against the assured." See also

Hillyard on Ins., 808.
2 Phillips on Ins., 663.
Senat vs. Porter, 7 T. R., 154.
3 Phillips Ev. C. & H. Notes, 283.

That the admissions of the master, not made as part of the *res gesta*, are not admissible in evidence, is well established by the authorities.

Packet Co. vs. Clough, 20 Wall., 528.
Am. Steamship Co. vs. Landreth, 102 Pa. St., 131.
Ins. Co. vs. Mahone, 21 Wall., 152, 157.
Adams vs. R. R. Co., 74 Mo., 553, 557, 559.
Lane vs. Bryant, 9 Gray, 245.
Bacon vs. Charlton, 7 Cush., 581.
Luby vs. R. R. Co., 17 N. Y., 131.
Randall vs. N. W. Tel. Co., 54 Wis., 140.
R. R. Co. vs. Hunter, 33 Ind., 335.
1 Evans on Prin. & Agent, 190.

3. The court erred in excluding the following question, asked the witness Patterson:

Q. What is the custom of Canadian vessels about carrying a look-out forward?

See 2d Assignment of Error, also Rec., pp 47, 83.

Wagner, the mate, called by defendant (see Rec., p. 55), testified that when he took his watch there was no one else on deck but himself and wheelsman, and against plaintiff's objection, he was permitted to testify that there was no look-out stationed forward. To meet this and rebut the

inference of negligence, plaintiff sought to show that it was not the custom of Canadian vessels to carry a look-out forward in addition to the regular watch. (See Rec., p. 47.) This was not only excluded, but the court charged the jury (see Rec., p. 66), that if the loss was *occasioned by excessive speed, or by the want of a look-out*, the defendant was not liable. Inasmuch as the policy, under any construction, simply excepts loss arising from a want of *ordinary* care, and as there is no obligation under the policy for the insured to exercise anything more than ordinary care in the navigation of the vessel, it was certainly competent to prove the custom and usage of Canadian vessels, in respect to a look-out, as bearing upon the question of ordinary care.

V.

AS TO THE ACCEPTANCE OF THE ABANDONMENT.

Under this head we will consider the 8th, 9th, 10th and 11th specifications of error.

The Record, page 35, shows that shortly after the stranding, and on June 26th, telegraphic notice of the abandonment of the steamer as a total loss, was sent by the plaintiff to the underwriters, a copy of which is set forth in the charge of the court (Rec., p. 67), and is in the following words: "Spartan ashore on Caribou Island, and this company beg to inform you that they abandon the boat and claim a total loss. Please inform underwriters. Signed, J. N. Beaudry, Secy. Rich. & Ont. Nav. Co." The court below held that this was a sufficient notice of abandonment. (See Rec., pp. 67, 68.)

If the abandonment was accepted, either expressly or

constructively, the liability of the defendant thereby became fixed, irrespective of the cause of the loss.

We claim that the evidence shows, or at least tends to show, a constructive acceptance by the underwriters.

It appears that upon receiving notice of the stranding of the steamer, the underwriters sent a wrecking expedition to her relief. It does not appear that any reply was made to the notice of abandonment, but the underwriters, by means of the wrecking expedition, continued their efforts to rescue the steamer; that she was finally gotten off and brought to Detroit, a port foreign to her owners, and several hundred miles from the place of disaster, without any notice being sent to her owners; and that the wrecking expenses, including as well the expense of bringing her from Lake Superior to Detroit, as the expense of raising the vessel, amounting in all to $7,455.13, were paid by the underwriters. (Rec., p. 35.)

Upon arriving at Detroit in her wrecked condition, the the steamer was placed in dry dock, where a survey was held by Mr. Gibson, who was appointed by the underwriters, and by Mr. Kirby, chosen by the *charterers* of the steamer. No notice of the survey was given to the owners, nor were they consulted in relation thereto, but they were wholly ignored from the time notice of the abandonment was received by the underwriters.

It further appears that Mr. Gibson was sent by the underwriters to look after the repairing of the vessel, and that he directed the master to keep a strict supervision of the work. (Rec., p. 41.)

Crosby, one of the general agents of the underwriters, Rec., p. 61, testifies that Gibson was sent to Detroit to act on the survey, and afterwards to see that no more repairs were put on the steamer than were called for by the survey.

The evidence does not show expressly who made the contract with the Dry Dock Company for the repairs, but it does appear that the *owners* gave no directions whatever in respect to the repairs; and Patterson, the manager of the Own Sound Steamship Company, the charterers of the vessel, testified that he gave no direction about any repairs.

After receiving notice of abandonment the underwriters without replying to the notice, as already stated, proceeded with the work of rescuing the steamer, and finally got her off and brought her to Detroit for repairs. Now in what capacity did they act in so doing? It must have been as owners under the abandonment, or as salvors. If they intended to act as salvors merely, it was their duty to have signified the fact to the owners so that they might have given direction as to wherethe steamer should be taken, and as to repairing her. But the underwriters gave no notice of their intentions. They made no reply to the notice of abandonment. Their silence after receiving notice of the abandonment, their bringing the steamer to Detroit for repairs, their failure to consult with the owners in respect to the repairs, their entire failure to return or offer to deliver the vessel back to the owners was evidence that they were acting as owners under an acceptance of the abandonment and not as salvors. Mere failure to reply to a notice of abandonment may not of itself be sufficient to prove an acceptance of an abandonment; but silence coupled with such action on the part of the underwriters as is shown in this case, is ev[illegible] from which the jury may find an acceptance.

The court therefore should have instructed the jury according to plaintiff's 5th, 6th, 7th and 8th requests upon this point. (See Rec., pp. 63, 64.) Its refusal so to do was error.

In *Northwest Trans. Co. vs. Ins. Co.*, 59 Mich., 233, it was said where the insurer, after receiving notice of abandonment, proceeds to recover the property, "such acts would "signify the acceptance of the abandonment, and that the "insurer was acting in the character of owner; and especi- "ally would this be so when the insurer had preserved "silence in reference to the abandonment, and had neither "denied the right to abandon or given notice of a refusal "to accept. Under the circumstances shown good faith and "fair dealing," required that the defendant should have notified the plaintiff if it did not intend to accept the abandonment. It had no right by its silence to lull the plaintiff into the belief that it had accepted if it did not intend to accept."

That the taking possession of a vessel, or proceeding to repair her by the underwriters after notice of abandonment, without protest or notice of their intentions, is evidence of an acceptance, is recognized by all the authorities.

In *Cincinnati Ins. Co. vs. Bakewell*, 4 B. Mon., 557, cited elsewhere in our brief, it is said: "The insurers, after a peremptory abandonment by Farrow, have, in Farrow's absence, without communication with him, without offer, agreement or negotiations with respect to the object and terms of their interference, without avowing at the time that they were acting for his benefit and at his expense, taken possession of the boat and proceeded to repair her. * They profess that they acted as salvors merely. * * They did not profess that character when they took possession of the boat, and its assumption *now* will not avail to defeat the inference and avoid the responsibility arising from the acts."

Prov. Ins. Co. vs. Le Duc, L. R., 6 P. C. C., 224, fully approves the case of "*Bakewell.*" Their lordships say:

"There is no evidence that the plaintiff, at any time during the period, had notice of the object with which the defendants took and retained the possession of vessel, or that they disputed their liability for the loss upon the ground of a breach of warranty, or that they repudiated the notice of abandonment," and they therefore held that an acceptance of the abandonment was shown.

2 Arnould on Ins., 1175, says: "The rule, in fact, seems "to be, that the underwriter, if he means not to accept the "abandonment, should make known his intentions as soon "as he has had a reasonable time and opportunity for "informing himself of the state of the damaged property, "and before the assured, in consequence of his silence, can "fairly have been led to conclude that he acquiesces in the "abandonment."

Barber on Insurance, 372 and cases there cited.

There is nothing in the provisions of the policy which takes the case out of the general rule for which we contend. The policy is identical with those in the cases decided by Michigan Supreme Court and the case in 9 Wallace, cited in our brief.

The sue and labor clause declares that "in case of loss or misfortune, it shall be lawful and necessary for the assured, their agents, etc., to give the assurers prompt notice of the disaster, and submit the plan adopted for recovering and saving the property, and to make all reasonable exertion in and about the defense, safeguard, or recovery of said vessel or any part thereof, without prejudice to the insurance; etc. * * and in case of neglect or refusal on the part of the insured their agents or assigns, to adopt prompt and efficient measures for the safeguard and recovery thereof or to repair the same when recovered, then the

said insurers may and are hereby authorized to interpose and recover the said vessel, or after recovery cause the same to be repaired, or both, for account of the insured, etc." The policy also declares "that the acts of the insured or insurers or their agents, in recovering, saving, and preserving the property insured, in case of disaster, shall not be considered a waiver or an acceptance of an abandonment, nor as affirming or denying any liability under the policy, but such acts shall be considered as done for the benefit of all concerned and without prejudice to the rights of either party."

We insist that under this policy, a notice of abandonment having been given and received by the underwriters, it was their duty if they proceeded to recover the vessel, to cause her to be repaired, and to tender her back to the owners, so as to fully indemnify them for their loss. They could not legally take possession of the steamer after such abandonment, and recover her from her stranded situation, without also repairing her, and tendering her back.

The taking possession of the vessel, the raising and rescuing of her after receiving notice of abandonment, without protest or notice to the owners that they did not intend to accept the abandonment, amounts to a constructive acceptance, and renders the insurers liable as for a total loss, irrespective of the causes which brought about the loss.

The following authorities seem to be conclusive upon this point:

Northwest Transportation Co. vs. Continental Ins. Co., 21 Fed. Rep., 171. The steamer "Manitoba" was insured under several policies in all respects identical with the one at bar, except as to names, dates and amounts. She was stranded in Lake Huron at about the close of the season of

navigation. Efforts, in which both the owners and underwriters co-operated, were made to get her off, without success. Upon the suspension of these efforts, and early in December, the owners gave notice of abandonment, to which the *underwriters made no reply*, but in the following spring they sent an expedition which succeeded in getting the steamer off, brought her to Detroit, and there tendered her in a wrecked condition to the owners, who declined to receive her, but sued for a total loss, claiming that under these facts a constructive acceptance of the abandonment was shown. Defendant denied its liability for a total loss, because it was not shown that the damage suffered by the steamer amounted to 50 per cent of her value. *Held*, that the owner was under no obligation to receive her in her wrecked condition, and that the underwriters must be deemed, as a matter of law, to have accepted the abandonment. The court says that "there is no doubt that an underwriter may, by his conduct, make himself liable for a constructive total loss when there is no right to abandon, and no intent on his part to accept the abandonment, and even an express refusal to accept it."

Northwest Transportation Co. vs. The Thames & Mersey Ins. Co., 59 Mich., 214, was a case against another of the underwriters on the Manitoba, in which substantially the same facts were developed at the trial, and it was there held by the Supreme Court of Michigan, that it was the duty of the underwriters, after receiving notice of abandonment, if they proceeded to rescue the vessel and bring her into port, also to cause her to be repaired, and that their failure to cause her to be repaired, and tender her back to the owner within a reasonable time, was evidence of a constructive acceptance of abandonment. The opinion delivered

by Mr. Justice Champlain is a full and exhaustive discussion of the principles involved. He says that the steamer was in a position where a prudent owner might well apprehend a total loss, and "that an abandonment made under "these circumstances and accepted by the insurers, was "sufficient to fix the liability of the company as for a con- "structive total loss, even though the damage should after- "wards be found to fall short of the requisite amount. "After abandonment and acceptance, it is too late for "either party to recede. The title passes to the insurer, "and he becomes the owner. If the loss turns out to be "less than 50 per cent, that fact does not operate to transfer "the title, or give an insurer the right to surrender or ten- "der the vessel to the assured."

The principle of this decision clearly applies to the present case. There the owner's right to claim for a total loss was denied because the amount of the damage did not justify an abandonment. In this case the right to abandon is denied, because, as it is assumed, the loss was the result of a peril not insured against. But in both such cases, if the abandonment is accepted it is too late for either party to recede. The title passes to the insurer, and he becomes the owner, because of the acceptance, and therefore is liable as for a total loss. In discussing whether the facts in that case amounted to an acceptance of the abandonment, the court (page 231) says: "Nothing was said by the defendant's agents or officers, either accepting or rejecting the abandonment made by plaintiff. It is claimed, however, that under the facts and circumstances, by their acts in the premises subsequent to the abandonment, the defendants have accepted it. These acts consist in taking possession for the purpose of rescuing and retaining possession of the

steamer and then recovering her, and taking her to the port of Detroit, where the defendant neglected to cause repairs to be made, or to tender the amount found necessary by the survey to put her in repair. The plaintiff contends that it was the duty of defendant, after taking possession for the purpose of recovering the vessel, to proceed with due diligence, and without unreasonable delay, to recover and repair the steamer, and that by reason of its negligence in that respect, it has precluded itself from denying that it has accepted the abandonment, and from its action and negligence, acceptance will be inferred." And at page 233 it is said substantially that where the underwriters, after notice of abandonment, proceed to recover the property : " *Such act* would signify an acceptance of the abondonment, and that the insurer was acting in the character of owner, and especially would this be so when the insurer had preserved *silence* in regard to the abandonment, and neither denied the right to abandon, or give notice of a refusal to accept. *The rights of the respective parties, as well as good faith and fair dealing, requires such a construction to be placed upon the contract.* The owner, from the time a legal abandonment is made, ceases to have any right or interest in the property, which then becomes vested in the insurer, and while it remains incumbent upon the insurer to show the facts which gave him the right to abandon, he may relieve himself from that burden by showing acceptance, either express or implied, by the insurer."

The Richelieu & Ontario Nav. Co. vs. The Thames & Mersey Ins. Co., 40 Northwestern Reporter, 758, was an action by the present plaintiff in the State court against one of the insurers of the Spartan. The testimony, except in regard to the repairs, was similar to that set forth in the

present record. The defendant relied upon the same identical defense which is set up in the present action, and it was there held that the facts established a constructive acceptance of the abandonment, and that the plaintiff was entitled to recover as for a total loss. At page 764 the court says: "The jury have found specifically that the "owners abandoned the steamer to the insurers; that, after "receiving notice of abandonment the insurers got her off "and brought her to Detroit; that they placed her in dry "dock and caused her to be repaired; and that they did not "return her, or offer to return her, to the owners. It is "claimed, however, by defendant, that, admitting all these "facts to be proved, yet, if it was done in ignorance "on the part of the insurers as to the cause of "the loss, and believing that the loss was occasioned "by one of the perils insured against, when in fact the "loss was occasioned by perils not insured against, which "fact did not come to the attention of the insurers until after "the repairs were made, an acceptance of the aban-"donment under such circumstances would not be con-"clusive on the part of the defendant, and it would have a "right to open the whole controversy, and inquire into the "cause of the loss; and if it did occur by perils not insured "against or by the negligence of the parties having her in "charge, or by unseaworthiness, these facts would defeat the "plaintiff's right of recovery. We cannot agree with the "counsel in this view. An abandonment once made and "accepted, fixes the rights of the parties, and renders the "insurers liable as for a total loss. Here was written "notice, signed by the owners, that they abandoned her to "the insurers. It is received by the insurers. They act upon "it, take the vessel in charge, put her in dry dock, cause

"her to be repaired at great expense, and retain possession. "They do not return, or offer to return her to the owners. "These acts amount to an acceptance. The title of the "vessel passes to the insurers under such circumstances. The "insurers had the right to refuse acceptance until they "make inquiry into the cause of the accident, and if it "was occasioned by any peril not insured against, or by "neglect of the parties having her in charge for the "owners, or her unseaworthiness, or other causes excepted "in the policy, and if these facts were found to exist, liability "would not attach; but it cannot be said that the insurers "may do all the acts found to have been done by them in "this case, without inquiry as to the cause of the accident, "—make repairs to an amount exceeding 50 per cent. "of the value of the vessel, fail to return her, and make no "offer of return, and, when an action is brought upon the "policy, then for the first time set up a claim that the "acceptance is not conclusive, and be permitted to make "the inquiries as to the cause of the accident they should "have made before performing all these acts, which amount "to an acceptance."

While the decision of the Supreme Court of Michigan may not be binding upon this court in the present case, we submit that this court ought to reach the same conclusion, unless there are strong and cogent reasons to the contrary. The policy was upon the same vessel. Its terms are identical with the one involved in the present suit. Indeed, the contract may be said to be the same contract; and for the sake of uniformity and certainty, the same rule of law should be administered by both courts. The rule laid down by the Supreme Court of Michigan is abundantly sustained by authorities. Indeed, that court simply followed the previous decisions of this court in the following case:

Copeland vs. Phœnix Ins. Co., 1 Woolworth, 278. A steamer was sunken in the Missouri River above Omaha. The underwriters were notified of the loss, and they, under the terms of the policy, took possession, for the purpose of raising, repairing, and tendering her to the plaintiff. But there was delay in doing the work, and plaintiff, when the vessel was finally tendered to him, refused to receive her upon the grounds: 1. That he had rightfully abandoned her to the defendant. 2. That there was an unreasonable delay in repairing and returning the vessel. 3. That the repairs were insufficient. Mr. Justice Miller held that under the evidence a case was not made which justified an abandonment at the time notice of abandonment was given; but he also held that there was an unjustifiable delay in making the repairs by the underwriters, they having undertaken that work, and, as the repairs were insufficient, the plaintiff was entitled to recover as for a total loss. In the course of his opinion he says: "Without going into an examination of the authorities, I may state that the condition of these policies, supported by the law, requires that the vessel, when tendered, should have been in such a condition that the plaintiff, when receiving her, should have full indemnity for all the injury covered by the policy."

That the defendants in this case have not brought themselves within this rule of law, or within any rule which permits them to deny an acceptance of the abandonment, appears from the fact that while the underwriters took possession of the Spartan and brought her to Detroit, and there caused her to be repaired, they have never so much as offered to return her to the owners. The contract of marine insurance is a contract of indemnity, and it is not

performed on the part of the underwriters unless it appears that he has indemnified the owners for the loss which they have suffered.

The case last cited was taken to this court, and there affirmed. (See *Copelin vs Ins. Co.*, 9 Wallace, 461.) Mr. Justice Strong, delivering the opinion, said: "Doubtless "had the defendants taken possession of the boat, as they "were authorized to do, by the provisions of the policy, "and had they raised, completely repaired and returned her "to the plaintiff in reasonable time, they could not be held "liable for a total loss. It is an established fact that there "was no right to abandon when they did take possession of "the vessel. And it was expressly stipulated in the policy "that the acts of the assured, or insurers, or of their joint "or respective agents, in preserving, securing or saving the "property insured, in case of danger, or disaster, should not "be considered, or held to be, a waiver or acceptance of the "abandonment. It is well settled, however, that an offered "abandonment may be accepted, even when the assured has "no right to abandon, and, if accepted, it must be with "its consequences. And an acceptance need not be "expressly made. It may even be refused, and yet the "insurers, by their conduct, may make themselves liable as "for a total loss. Though, by the terms of the policy, "these defendants had a right to take possession of the boat, "and repair her for account of the plaintiff, yet this was a "privilege accorded to them only, that they might thus "make indemnity for the loss. Taking possession to make "partial repairs, not amounting to indemnity, was not con-"templated by the contract. It was not authorized. Nor "did the contract warrant taking possession of the boat and "holding her for an unreasonable time. The insurers

"were bound to repair and return without unnecessary "delay. In holding longer than was necessary for making "repairs, they must be regarded as acting not as insurers, "but as owners, for they had no other authority than that "of owners for their failure to return within a reasonable "time. Their action was, therefore, a substantial recogni- "tion and acceptance of the abandonment of which they "had been notified, for in no other way had they become "owners. On no other theory can this delay be considered "lawful. It is true the policy stipulated that the acts of "the insurers in preserving, securing or saving the property "insured in case of danger or disaster, should not be con- "sidered or held an acceptance of abandonment, but this "manifestly refers only to authorized acts. Retaining pos- "session of the boat an unreasonable time, and then offering "to return her unrepaired, were not authorized acts, and "consequently they are unaffected by the stipulation. They "must therefore be regarded as constructive accept- "ance of an abandonment."

The terms of the policy in the case cited, were substantially the same as in the one at bar.

Norton vs. Lexington, &c., Ins. Co., 16 Ill., 235. This case was decided in 1884. A schooner was wrecked near False Presque Isle, in Lake Huron, on November 27th. Navigation was closed, or nearly so. She could not be raised without facilities which were not within the reach of the master and crew. On February 26th her owners abandoned to the underwriters. The vessel lay in the condition in which she was left, without any effort to get her off, until June 26th, when the underwriters sent a person to the wreck who got the vessel off, took her to Malden, in Canada, and there repaired her. She was not tendered to the owners

until the succeeding August. They refused to receive her, and brought suit for a total loss. The court charged the jury that if the vessel was not repaired so as to be substantially as good as before she was driven ashore, within a reasonable time under the circumstances, or was not *tendered* to the claimants within a reasonable time after she was repaired, then this would amount to an acceptance of the abandonment. This ruling was sustained. The court, in a very elaborate opinion, says that the testimony offered very strong evidence to show not only was the vessel not gotten off and repaired and returned within a reasonable time, but she was so repaired as to diminish her storage capacity. "If the insurers took the vessel to repair her under the "clause of the policy which authorized them to do so, and "failed to return her within a reasonable time, they must "be held to have retained her under the abandonment, "although they were not bound by the abandonment when "made. Even if there had been no abandonment, and "insurers had taken possession of the vessel after she was "stranded, under the clause in the policy referred to, and "failed to return her properly repaired within a reasonable "time, they would thereby render themselves liable as for "a total loss."

Provincial Ins. Co. vs. LeDuc, L. R., 6 P. C. C., 224, 11 Eng., 84. A Canadian vessel was insured by Canadian underwriters. The policy provided that she should not be within the Gulf of St. Lawrence within a certain prescribed period. In violation of this provision the ship went into the gulf within the prohibited time and was wrecked. Upon receiving notice of the disaster the insurers sent their agent to look after their interests in the vessel, who took possession of her for this purpose. While she was in his

possession the owners gave notice of abandonment. Through the efforts of the agent of the underwriters she was finally raised and taken to Gaspé, where she was subsequently libeled and sold for the salvage expenses. *Held*, that although the insurers declared that they never intended to accept the abandonment, and that they took possession merely as salvors, that the facts showed a constructive acceptance of the abandonment, and that they were therefore liable as for a total loss. The cases of *Peele vs. The Merchants Ins. Co.*, 3 Mason, 27; *Peele vs. Suffolk Ins. Co.*, 7 Pick., 254; *The Cincinnati Ins. Co. vs. Bakewell*, 4 B. Monroe, 451, are expressly approved. *The fact* that the insurers did not *repudiate the notice of abandonment, nor give notice to the insurers that they were acting as salvors, is treated as evidence of the acceptance of the abandonment.* The court say: "That by the acceptance of the abandon-"ment, the defendants become liable as for a total loss. "In *Smith vs. Robertson*, 2 Dow, 477, it was held that the "insurers could not be allowed to say that the loss was not "total, after they had acquiesced in the abandonment as for "a total loss, and had thereby admitted that the loss was a "loss of that description. In that case the insured had no "right to abandon, but merely a right to give notice of "abandonment. But the moment the notice was accepted, "the abandonment took effect; the loss immediately became "tantamount to a total loss; and the insurers were precluded "from relying upon the subsequent recovery of the property, "because they were not allowed to say that the loss was not "total." * * * "In the case of the *Cincinnati Ins.* "*Co. vs. Bakewell*, the insurance was merely against a total "loss. But it was held that the insurers could not, after the "acceptance of an abandonment, rely upon the fact that the

"loss was not total, and consequently that it was not a loss "within the terms of the policy." "There is no distinc- "tion, in principle, between an express and a constructive "acceptance of an abandonment. The effect produced "upon the rights of the parties is the same in both cases." * * * "By the abandonment and the acceptance of the "abandonment, the matter was closed. The whole interest "of the plaintiffs in the thing abandoned was transferred to "the defendants, and became their property." And it was further held in this case that even a breach of warranty on the part of the insured would constitute no defense, there having been a constructive acceptance of the abandonment.

This case is approved and followed by the House of Lords in *Shepherd vs. Henderson*, L. R. 7 App. Cases, 49; 35 Eng., 30.

Cincinnati Ins. Co. vs. Bakewell, 4 B. Monroe, 541. A vessel insured in form against total loss only, was stranded and partially sunken in the Ohio river, and her owner offered to abandon her, but the insurers, believing she could be raised and repaired for less than half her valuation, refused to accept, and afterwards raised her, etc., claiming to have acted as salvors merely; for the amount expended, which was less than half the value of the vessel, they claimed to have a lien, which they sought to enforce against the vessel in a court of equity. *Held*, that the policies included a constructive as well as an actual total loss, and that the insured might abandon, if from a fair view of all the circumstances, the cost of rescuing and repairing the vessel would amount to 50 per cent of her value; and that, as the insurers took and retained possession of the boat after the abandonment, without qualification,

and without repudiating the abandonment, and as they had never restored her to her owners, there was an implied acceptance of the abandonment. The court say: "The "insurers, after a peremptory abandonment by Farrow, after "due ascertainment and consideration of the facts by their "own agents, and after having treated with contempt the "request for aid, have, in Farrow's absence, without com- "munication with him, without offer, agreement or negotia- "tion with respect to the object and terms of their inter- "ference, without avowing at the time that they were "acting for his benefit and at his expense, taken possession "of the boat and proceeded to repair her. * * * * "And as they took and retained the possession and control "of the boat after the abandonment, without qualification "or reservation, or other agreement than that which is to "be implied from connecting this conduct on their part "with the previous abandonment, we think their acts nec- "essarily imply and constitute an acceptance of the "abandonment, and the consequent liability for total loss."

In *Reynolds vs. Ocean Ins. Co.*, 22 Pick., 191. Shaw, C. J., said: "If the defendants did not in good faith and "with reasonable diligence proceed to make a full and "complete repair and re-equipment of the vessel, or if at "the time of the offer to restore the vessel as fully repaired "and equipped, the assured pointed out deficiencies which act- "ually existed, and the underwriters refused or unreasonably "neglected to supply these deficiencies, they must be con- "sidered as having made her their own, and as having "accepted the abandonment, and then the assured would be "entitled to recover as for a total loss."

In the same case, again reported in 1 Metcalf, 160, the same learned judge says: "The ground, and the only ground,

"upon which the underwriters can defend themselves, in a "case like the present, is, that they have restored, or tendered "the vessel to the assured, repaired and made whole, and fit "for use within a reasonable time. * * * In the pres- "ent case, the jury have found, that after the defendants "took possession and control of the vessel, with the purpose "and design of getting her off, repairing, and restoring her "to the assured, they did not use reasonable diligence; and "we are therefore of the opinion, that the vessel was not "tendered within reasonable time; that by the delay, "the defendants forfeited their right to return her, and "must be considered as having accepted the abandonment."

Defendant's counsel may argue that the underwriters were ignorant of the circumstances surrounding the loss, and therefore their taking possession of the steamer after notice of abandonment and getting her off, would not amount to acceptance of abandonment.

But we insist that there is no foundation for this argument.

First—Because, Crosby, the underwriters' general agent, testified that he had a copy of the protest (see p. 46), and, of course, he was chargeable with notice of all the protest contained.

Again, if the agents of the underwriters did not have actual notice of the circumstances surrounding the loss, *they had the means of* knowledge, and a person with *the means of knowledge* at his command is to be regarded as one having actual notice. Crosby came to Detroit soon after the arrival of the steamer. He there saw Captain McGregor at the dry dock, and could have learned from him all the facts in the case. He had a far better opportunity to ascertain the facts than the plaintiffs had. They resided at Montreal; they had no agent at Detroit to represent them

upon the arrival of the vessel, or at any time while she was was being repaired. It cannot be pretended that the plaintiff had any knowledge whatever of the circumstances attending the stranding of the steamer, or that they in anywise misled the underwriters. As the plaintiff in no way misled the underwriters, if the latter chose to act without making inquiry, when such inquiry would doubtless have resulted in obtaining the information, it cannot defend itself upon the ground of want of information.

Angel on Limitations, Sec. 188, 190.
Farnam vs. Brooks, 9 Pick., 246.
Reynolds vs. Ins. Co., 22 Pick., 197.

But if the insurers were in fact ignorant of the circumstances surrounding the loss, they could not go on indefinitely under the notice of adandonment. It was their duty to make inquiry. Mere ignorance on their part of the circumstances surrounding the loss would not prevent an acceptance of the abandonment, which their actions would otherwise indicate. They are to be judged by their acts. An abandonment rightfully made, or accepted operates as a matter of law, *ipso facto*, to transfer the title to the vessel to the underwriters. They thereby become the owners as effectually as if they had accepted a formal bill of sale, signed, sealed and delivered; and their title relates back to the time of the loss, and this title could not revert to the insured because of ignorance on the part of the insurers respecting the cause of the loss.

Again, it may be further argued that because Captain McGregor, the master of the Spartan, remained with her after the abandonment, and assisted in bringing her to Detroit and placed her in dry dock, and, to some extent, superintended the repairs, that therefore an acceptance of the

abandonment on the part of the insurers is not established. To this, we reply:

1. The owners are not bound by the action of Captain McGregor because he was not their agent; he was not employed by them but by the charterers.

2. Under the law of marine insurance, the master, after abandonment, becomes the agent of the *insurers*. He is responsible to them, and they are responsible for his acts.

In 2 *Parsons Marine Ins.*, 198, it is said: "The master and crew become, by abandonment, the agents or servants of the insurers; and as the insurers bear the risk of their conduct, so they are entitled to all the benefit which may arise from it; and, even after condemnation by a prize court, the master, or whoever is in charge of the property, remains so far the agent of the insurers that if he purchase the property at the sale, avowedly for himself, the insurers may adopt the purchase as made for them by their agent."

In *2 Arnould on Ins.*, 1191, it is said: "If an abandonment be made, which is either accepted or ultimately proves effectual, the effect of such abandonment is, to constitute the underwriters owners of the property, from the moment of the casualty, and, therefore, to make the master, by operation of the law, the agent of the underwriters, in all that he has done, *bona fide*, for the recovery of the property from that time." (See also p. 1192, and cases there cited.)

In *2 Phillips on Ins.*, Sec. 1732, it is said: "So also on abandonment, the master or agent of the assured who has charge of the subject at risk, becomes the agent of the underwriters, to the effect that his acts are at their risk and for their benefit, from the time to which the abandonment has reference, so far as the subject is covered by the insurance."

In *Lee on Ins.*, 488, it is said : " If after a valid abandonment has been made, and the captain is necessarily continued or allowed by the insurers to continue in the management of the wreck, he then becomes their agent, and they are bound by, and accountable for his actions."

Smith vs. Ins. Co., 7 Met., 448.
U. S. Ins. Co. vs. Robinson, 2 Caines, 279.
Chesapeake Ins. Co. vs. Stark, 6 Cranch, 268.
Story on Agency, Sec. 118.
2 Parsons on Ins., 125.

That Captain McGregor did not suppose that he was representing the owners in what he did in regard to the repairs, and that he was not acting under their authority, is shown by his own testimony. (See Rec., 41.) It may be inferred from the testimony of Mr. Milloy (Rec., 46).

VI.

The court erred in excluding the evidence referred to in the third Specification of Error (see Record, 53).

This evidence was the record in the suit instituted by the Detroit Dry Dock Co. against the Spartan, to enforce its lien for repairs made upon the steamer in consequence of her stranding, and was offered for the purpose of showing a constuctive acceptance of the abandonment. The record shows that the underwriters caused the steamer to be brought to Detroit for repairs, and that she was there repaired. In the absence of all proof to the contrary, it would be presumed that they were responsible for the repairs, and we submit that it was competent to prove that

the steamer was sold to satisfy the lien, which the insurers had contracted for the purpose of establishing an estoppel against them.

Provincial Ins. Co. vs. Le Duc, L. R. 6, P. C. C., 224 ; 11 Eng., 84.

We submit that the judgment of the court below should be reversed and a new trial granted.

F. H. CANFIELD,
Counsel for Plaintiff in Error.

SUPPLEMENT.

That the burden of proof is with the underwriters if they seek to avoid liability on the ground of negligence to show that there was a want of ordinary care and skill in the navigation of the vessel on the part of her officers, appears from two considerations:

1st. Negligence is not to be presumed, but is to be proved affirmatively, whenever it is averred, either as a cause of action, or as a matter of defense.

> Railroad Co. vs. Gladmon, 15 Wall., 406.
> Railroad Co. vs. Mares, 123 U. S., 710.
> Transportation Co. vs. Downer, 11 Wall., 129.

2d. Because the general principle of law, that every man is presumed to do his duty until the contrary is shown, applies to the duty of the master in the navigation of his vessel.

In *American Ins. Co. vs. Bryan*, 26 Wend., 563, a policy insured goods to be transported from New York to New Orleans by ship "Kentucky," and from New Orleans by steamboats or boats to Tuscumbia, against perils of the seas, pirates, rovers, *thieves*, barratry of the master and mariners. On the arrival of the goods at Tuscumbia it was discovered that some of the boxes had been broken open and again closed, and that some of the goods were missing. At the trial defendants insisted that the plaintiffs were not entitled to recover, it not having been shown that the goods had been taken by *assailing* thieves, and that according to the construction of the policy of insurance, the word "thieves" should be deemed only to apply to *assailing* thieves, and not

to a felonious taking by the crew. It was held that defendants were right in their construction of the policy, but that plaintiffs made a *prima facie* case entitling them to recover by showing a loss by theft, without proving due care and vigilance on the part of the master and mariners. Verplanck, Senator, said:

"Barratry or criminal knavery of the mariners, included under that large term embezzlement of goods freighted on board, is a peril expressly insured against. When the loss occurs, the underwriter is *prima facie* responsible. A loss of this kind stands upon the same footing with any other loss by a risk insured against, as for instance, the perils of the sea by rocks or tempests. The insurance in either case is an express contract, to make good any unforeseen loss thence arising. But like losses by shipwreck, a loss by barratry of mariners must also be discharged, if it arose *immediately* from the fault of the master, for his neglect short of barratry was not one of the risks undertaken specially, nor is it included as a peril of the sea. The insurers are discharged from loss by shipwreck caused by the ignorance or inattention of the captain; unless they specially insured against it. For the same reason the captain's culpable negligence as to the goods under his care may discharge the insurers from loss by barratry of the crew. But here, too, as in respect to loss by shipwreck, the defense of the master's misconduct is an *excuse, a ground for exemption* from liability, by showing that the loss though appearing *prima facie* to have been caused by a peril insured against, was in fact the immediate result of some other danger, not assumed in the policy, *and like all similar defenses against prima facie proof, it must be proved by those who are to be benefited by it.* It is a general principle of common law, (with one or two specific exceptions on the ground of public policy,) that every man is to be presumed to do his duty until the contrary is established, and therefore the burden is on the plaintiff to negative this presumption by appropriate proof. *Thus, the burden of proof is here on the underwriters. The assured is never required to prove affirmatively the fact of due diligence and care* in order to make out his case, before any objection is raised. Thus it has been held

in the United States courts as to *negligent navigation, deviation, unreasonable delay*, that the proof is to be made out by those who are to be discharged by it from liability; the *presumption* is with the assured after proof of loss. It has been thus held in the English courts as to barratry of the master." In *Ross vs. Hunter*, 4 T. R., 37, the court said that the question being whether the evidence for the plaintiff was sufficient to be left to the jury when the barratry of the captain was proved, "then the rule of evidence applies, that the affirmative is always to be proved by those whose interest it is to prove it." Judge Buller said, "the plaintiff in such cases is to prove subscription to the policy, his interest, shipment in the vessel described, loss in consequence of such acts as amount to barratry;" but that "it was not incumbent on the plaintiff to prove a negative." So more recently, on a defense by reason of an alleged violation of local law, it was held, that the burthen of proof was on the underwriter, "the presumption being that the party complied with the law." (4 Camp., 234.) In the present analogous case, the plaintiffs below were not bound to prove the care and vigilance of the master or others. *Ordinary and sufficient vigilance* is to be *presumed till the contrary is shewn, in the same manner as competent navigation, due course of voyage without deviation, or obedience to port and revenue laws.* * * * And referring to the rule as laid down in 11 Peters, 225: "That in all cases of loss we are to attribute it to the proximate, and not to any remote cause." The court further say that "It would then seem that the underwriters would not be discharged from their contract of indemnity against the thefts of mariners, unless by evidence of such an omission of duty on the master's part as did not amount to barratrous negligence, and was not a remote and accidental, but an immediate and proximate cause of loss. Such a degree of negligence may possibly occur, but it seems to require such precision of proof and is subject to such limitations and exceptions, that it cannot reasonably be presumed. "Had "there been any evidence of this nature, the judge "should have instructed the jury on that point, *but the* "*assured were not called to make out an affirmative case* "*of due vigilance.*"

It will be seen that although negligence of the master was not in terms excepted upon the policy in the case quoted, it was treated by the court as though it were excepted; and the decision, therefore, seems to be directly in point.

In *Tidmarsh vs. Washington F. & M. Ins. Co.*, 4 Mason, 439, the defendant claimed that the loss was occasioned by negligent navigation on the part of the master: 1st, in sailing from Prospect Bay, in Nova Scotia, into which place he had put for safety, without having two anchors on board; and 2d, by improper conduct in the course and sailing of the ship after he left that place on the voyage for Halifax, and also that there was a deviation by unnecessary delay. Story, Justice, in instructing the jury as to the burden of proof said:

"Now upon the three points of misrepresentation, *negligent navigation*, and deviation, my opinion is, that the burden of proof rests on the *defendant*. Each of them constitutes a substantial ground of defense, in respect of which the plaintiff is not to prove the negative, but the defendant is required to establish the affirmative."

In *2 Parsons Marine Ins.*, 533, it is said; "The law presumes that all men do their duty, and this rule has been applied to the duty of the master in navigating the vessel."

1 Taylor on Evidence, 344, says: "If to an action on a "policy of insurance effected on a ship, the underwriters "plead that certain material facts, known to the assured, "had been concealed from him, the burden of proving "the non-communication of these facts will, on a reply "traversing the whole statement of the defense, fall on the "defendant; for * * * some evidence should be given "by the underwriters, to rebut the presumption that the "assured had discharged his duty."

Supreme Court of the United States.

October Term, 1889.

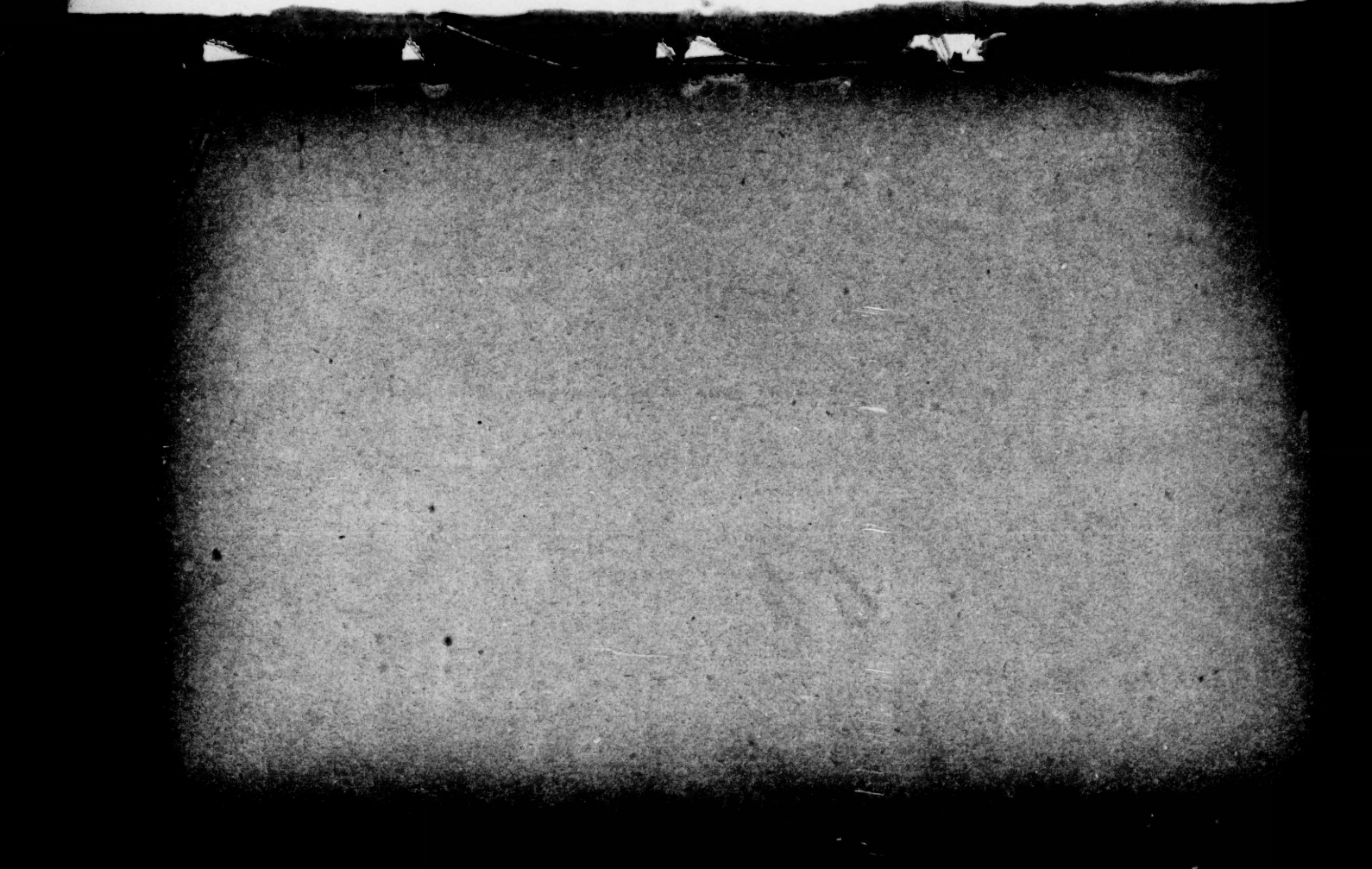
No. 296.

THE RICHELIEU AND ONTARIO NAVIGATION COMPANY,
Plaintiff in Error,
vs.
THE BOSTON MARINE INSURANCE COMPANY,
Defendant in Error.

In Error to the Circuit Court of the United States for the Eastern District of Michigan.

ARGUMENT ON BEHALF OF DEFENDANT IN ERROR.

HENRY H. SWAN,
Of Counsel for Defendant in Error.



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In Error to the Circuit Court of the United States for the Eastern District of Michigan.

BRIEF AND ARGUMENT IN BEHALF OF DEFENDANT IN ERROR.

STATEMENT OF FACTS.

The plaintiff in error, a Canadian corporation, brought this action of assumpsit on a policy of marine insurance for $10,000, written by the defendant in error, which was one of five insurers, upon the Canadian Steamer "Spartan," valued in the policy at $50,000, and insured in all to the amount of $40,000.

June 19, 1883, while running in a dense fog on Lake Superior at full speed and without a lookout and without taking soundings to ascertain or verify her course or position, the steamer stranded on Caribou Island, seventeen miles to the northward of her course. She was subsequently released and repaired. The insurers refused to pay the loss, and the insured brought suit.

The perils insured against are thus stated in the policy, (Rec., pp. 74, 78, inclusive.)

"Touching the adventures and perils which the said insurance company is content to bear and take upon itself by this policy, they are of the lakes, rivers, canals, fires, jettisons, that shall come to the damage of the said vessel or any part thereof, excepting all perils, losses, misfortunes or expenses consequent upon and arising from or caused by the following or other legally excluded causes, viz: damage that may be done by the vessel insured to any other vessel or property, incompetency of the master or insufficiency of the crew or *want of ordinary care and skill in navigating said vessel*, and in loading, stowing or securing the cargo of said vessel, rottenness, inherent defects, overloading *and all other unseaworthiness*, theft, *barratry* or robbery."

The facts involved more fully stated are as follows:

The Spartan was an iron freight and passenger steamer of 678 tons burthen, running on the route between Owen Sound on Georgian Bay, Ontario, to Fort William, Ontario, on the north shore of Lake Superior, under charter to the Owen Sound Steamship Company, a Canadian corporation or association.

Her crew consisted of the master, two mates, two engineers, two wheelsmen, four firemen, a full complement in the cabin and four or five deck hands."

Record, pp. 34, 35.

Her compass was old and had been in use for some years, (Rec., p. 39). It had never been adjusted (Rec., p. 48), and "was defective more or less," "a little out;" there was a little variation which differed with the course on which this steamer was run. The master and mates knew its condition though neither knew the extent of its variation (Rec., p. 41, 57). There is evidence also that compasses on Lake Superior vary more or less at different points (Rec., p. 40); that an adjusted compass should not vary at all (Rec., p. 57,) and it is usual to have them adjusted to meet and obviate any local attraction.

Record, p. 48.

The Spartan thus equipped, and carrying 17 passengers, left Fort William on her return trip to Owen Sound, and stopping enroute at Silver Island, on the north shore of Lake Superior, left that port at 12.45 o'clock in the afternoon of June 18, 1883. She generally ran along the north shore both going and returning. On this occasion she laid her course from Silver Island for Passage Island; thence direct for Whitefish Point on the south shore of Lake Superior, and this was her first trip on this course (Rec., p. 36). Midway between Silver Island and Passage Island, a dense fog arose which continued until noon of the next day. She passed Passage Island at 2.30 o'clock p. m. Thence the usual or chart course led S. E. by E. 1-2 E. to Whitefish Point, passing about eight

miles to the southward of Caribou Island, an uninhabited and unlighted island, 132 miles from Passage Island. About 8 o'clock in the evening of June 18th, the master retired after giving to the second mate, who took the watch, the following written instructions for the navigation of the steamer.

"Monday evening. Mr. Harbottle: If it contin, ues thick keep her S. E. by E. until 3 a. m, then keep her S. E. by E. 1-2 E. small. If it clears continue on your course S. E. by E. 1-4 E. A. M. McGregor." (Rec., p. 36.) The steamer was hauled to the southward, as directed, at once, (Rec., p. 81). This was the second mate's first season on Lake Superior, and he had never run on the course between Passage Island and Caribou before that trip (Rec., p. 54.) The fog continued dense during Harbottle's watch, and he held the course prescribed by the order until he came off watch about one o'clock a. m. of the 19th, running the steamer at full speed (Rec., p. 54). The master testified that he "anticipated and supposed the steamer would be kept running at full speed," 12 to 12 1-2 miles per hour, and that his instructions "were based on the steamer's running on time" (Rec., p. 36), at 1.20 o'clock a. m. Mr. Wagoner, the first mate, relived Harbottle and took charge, navigating the vessel under the same order. "There was then a dense fog—thick fog—you could not see anything," Wagner says, (Rec., p. 55,) and also Malcomson, chief engineer, (p. 58.)

There was no lookout forward, no one else on deck during either watches besides the mate and the wheelsman. (Rec. pp. 54, 55.) No soundings were taken and the steamer was kept running "wide open," at

her full speed, "until Caribou Island brought her up," carrying her regular steam of 45 pounds, her maximum pressure being 47 pounds. (Rec. pp. 55, 57, 58,) In the judgment of the first mate and chief engineer, the steamer's speed was not safe or proper under the circumstances then existing, (Rec., p. 55, 58.) but the mate could not moderate it, because the steamer was running on time, and to do so would have "thrown him (the master) out in his calculations." At the time of the stranding the fog was so thick, "he (Wagner) *could not see anything—could not see the length of the boat.* If she had been running at half speed he might have backed her off." (Rec., pp. 55, 56.) "*But she struck before she reversed and went out good.*" (Rec., p. 56.)

From the course taken the steamer should have passed *seventeen miles* to the *southward* of Caribou Island; "she struck on the south-west point of Caribou Island, (in Canadian waters), at twenty minutes past two o'clock in the morning of the nineteenth of June, ran ashore and filled with water." * * * "*The said steamer was properly steered and wheeled.*" (Protest, Rec., p. 81, 82.)

This is also the testimony of the master, both mates and the chief engineer, who were the only witnesses who testified to the circumstances and causes of the stranding.

The master and the two mates unite in charging the disaster to the errors of the compass.

McGregor, Rec., 37, 39, 40; Wagner, p. 56; Harbottle, p. 55.

If this divergence of seventeen miles began at Passage Island, it would indicate an error of nearly

three-fourths of a point. Notice of the disaster and a request for assistance was sent by the master to the insurers, who received it June 22, (Rec., p. 35, 61,) and sent to the aid of the Spartan a tug and wrecking expedition which left Detroit June 23rd, and arrived at Caribou Island, June 25th. June 26th plaintiff sent the insurers telegraphic notice of abandonment, set forth in the charge of the court. (Rec., p 67.)

The steamer was released by the expedition and brought to Detroit by the order of her master, and there docked and repaired under his instructions, (Rec., p. 46, 60,) as Parker, the superintendent of the dry dock, plaintiff's witness, testifies, though the master denies that he ordered the boat brought to Detroit.

The evidence tended to show that the cost of repairs was $31 482.26. There is no evidence that defendant ordered the repairs, or claimed, or exercised any control over them or the steamer, or directed where she should be brought. Work not made necessary by the stranding was there done upon her under the orders of the charterers. (Rec., pp. 46, 61.) The repairs were completed in September. (Rec., p. 26.) In the following November, plaintiff served on the insurers the proofs of loss, (Ex. B, Rec., p. 79,) in which they state that "the steamer ran ashore * * * and became a wreck and total loss," * * "as will appear by a certified copy of protest of her master and mariners heretofore served upon you." * * * "In consequence of which the said Richelieu & Ontario Navigation Co. suffered damage, sustained loss or damage within the perils insured against," &c. The insurers knew nothing of the facts attending the

stranding, except what the protest shows, until after March, 1884. (Rec., p. 46,) Up to that time plaintiff and the insurers had been negotiating for a settlement of the loss.but could not agree upon the liability for duties on the repairs. After learning the facts, as above narrated, defendant and the other insurers refused to pay. This suit was then commenced, and the defendant pleaded the statutory general issue to action, which plea, in Michigan, "denies and puts in issue every fact, and combination of facts, necessary to constitute the plaintiff's cause of action."

Wilson vs. Wagner, 26 Mich., 455.

And defendant, on the ground that the loss was caused by excepted perils, viz:

1. Want of ordinary care and skill in navigating the steamer in the following particulars:

a. In negligently running the Spartan at full speed in the dense fog.

b. That such speed was a violation of the laws of Canada and contributed to the loss.

c. That the steamer was thus run without a lookout.

d. That no soundings were taken to ascertain the vessel's position.

2. Unseaworthiness in that the Spartan's compass was defective and unreliable to the knowledge of her master and officers.

There is no conflict of evidence as to the prevalence and density of the fog, the speed of the steamer, the want of a lookout, the failure to take soundings, or the fact that the compass had never been adjusted.

That the compass was defective, and was known

to be defective, is repeatedly admitted by the master and both mates, all of whom positively refer the stranding to that cause. The master on redirect examination sought to retract his express testimony to that effect given on cross-examination. There is evidence that on other occasions the compass had sufficed for the navigation of the steamer. The protest of the master by his direction was entered expressly against "fogs and defective compass," which words he had the notary interline.

Upon the evidence of these facts, most of which come from plaintiff's witnesses, the jury returned a verdict for defendant, upon which, after motion for a new trial, the judgment was entered, which is here under review.

I.

FIRST AND SECOND ASSIGNMENTS OF ERROR.

The rulings of the court that "no authority was shown on the part of Captain Gibson to bind the defendant in respect to the repairs made on the Spartan," and in striking out all the testimony, respecting the acts and statements of Gibson, were correct.

This proposition covers the first and second assignments of error. If the first ruling was correct, the second is its logical sequence.

The only evidence in the case bearing upon the authority of Gibson, is that of Thomas G. Crosby, who was called by both parties. (Rec., p. 61.) Mr. Crosby testified, that he "gave no orders or instructions to any person or persons whatsoever, as to the

repairs on the steamer, nor did he assume any responsibility therefor; that his object was not to assume responsibility; * * * that he sent Gibson to Detroit to act on the survey on the Spartan, and afterwards sent him to see that no more repairs were put on the steamer than were called for by the survey, as the Spartan had been damaged on previous occasions and not properly repaired."

When called by the plaintiff, (Rec., p. 46,) Mr. Crosby testified, that "Mr. Gibson was sent by the insurers from Buffalo to hold a survey on the steamer before she was repaired."

This is all the evidence in the record as to Gibson's authority. That he was not empowered to bind the defendant by acts or statements in respect to the repairs, is patent. The limit of his power from the insurers, was to act on the survey. He was afterwards sent to see that no repairs were made in excess of that survey.

There is no evidence that he was held out by any act of the defendant, as having any other authority whatever.

There was no offer to show that the defendant or any of the insurers knew that Gibson ever ordered or assumed the right to order any of the repairs to be made on the steamer. There is, therefore, no ground on which the defendant could be held answerable for any acts of Gibson, outside of his delegated authority, to act on the survey and to see that the repairs were kept within it.

The record shows that the bill of exceptions contain substantially all the evidence in the case respecting the loss of said steamer, her subsequent rescue,

the repairs made in consequence of her stranding, the abandonment to the underwriters by the plaintiff.

It is submitted that these assignments are without merit.

II.

THIRD ASSIGNMENT.

This is based on the exclusion of the question put to the witness Patterson, (Rec., p. 47,) "What is the custom of Canadian vessels about carrying a lookout forward." The statute of the Dominion of Canada, Ch. 29, 43 Victoria, put in evidence by the defendant, (Rec., pp. 61, 62,) entitled, "An Act to make better provisions for the navigation of Canadian waters" Assented to May 7th, 1880, in Articles 13 and 24, is identical with Articles 13 and 24, of the British regulations of 1884, and articles 13 and 24, of "Revised International regulations for preventing collisions at sea," adopted by Act of Congress, approved March 3rd, 1885, which are all exact reproductions of the British regulations of 1879.

2 Pritchards' Adm. Dig. Append. 2521-2.

By article 13, "every steamship shall, in a fog, mist or falling snow, go at a moderate speed." By article 24, "Nothing in these rules shall exonerate any ship, or owner, or master or crew thereof, from the consequences of any neglect to carry lights or signals, or of any neglect to keep proper lookout, or of the neglect of any precaution which may be required by the ordinary practice of seamen, or by the special circumstances of the case."

Substantially the same provision in the Act of Congress, of April 29, 1864, has been held to impose the duty of having a lookout, "as one of the ordinary precautions which a careful navigation involves."

The Faragut, 10 Wall., 334, 338.

The Spartan was a Canadian vessel, navigating Canadian waters, on a voyage between Canadian ports, and stranded on a Canadian island.

In these conditions, the law of her flag controlled her navigation. In the *Scotia*, 14 Wall., 170, 184, speaking of the navigation laws of the United States, the Court say, "Doubtless they are municipal regulations yet binding upon American vessels, either in American waters or on the high seas. * * * But every American vessel outside of the jurisdiction of a foreign power, is for some purposes, at least a part of American territory, and our laws are the rule for its guidance." "Equally true is it, that a British vessel is controlled by the British rules of navigation."

Of the applicability of the Canadian statute to the Spartan's navigation while in Canadian waters, there can be no doubt.

It is also the contract of the insured, that the navigation of the vessels should conform to the statute of Canada.

"It is an implied stipulation of the policy, that the vessel shall be navigated and the adventure conducted according to the laws of the country to which the vessels belongs, the treaties subsisting between that and other countries, and the law of nations."

1 Phillip on Ins., Sec. 736.

Assuming that the witness would have testified that Canadian vessels were not accustomed to carry lookouts forward—though the assumption is gratuitous and improbable in regard to navigation at full speed in a dense fog—such a custom being contrary to the statute is void, and will be disregarded by the Court

Walker vs. The Transp. Co., 3 Wall., 150, 155.
Thompson vs. Riggs, 5 Wall., 680.
The Duke og Sussex, 1 W. Rob., 274, 277.
The Sylph, 2 Spinks, A. & E., 75.
The Hand of Providence, Swaby, 107.
The Velocity, L. R. 3 P. C., 44, 50.
Marsden on Collisions, 313.

The evidence was inadmissible, independent of the statute, on the further ground that a custom to navigate without a lookout especially in a heavy fog, is obviously unreasonable.

In the *Rebecca*, Blatch. and How., p. 351, Judge Betts, said :

"The evidence offered to prove that a custom prevails with coasting vessels to run along the coast *in daylight* without a watch on deck, must be wholly disregarded by the court. Could a custom of that character be clearly established, it would be of no avail.

No court would uphold it. Property and persons transported along the coast would under such a usage be exposed to constant peril and disaster ; and a custom of that character would be disregarded and pronounced nugatory as injurious to navigation and trade and perilous to life."

And in the case of the *pilot-boat Blossom*, Olcott,

188, 194, the same judge said of the custom of running such boats without a lookout forward, independent of the wheelsman: "I should not hesitate to pronounce it grossly culpable, * * * whatever evidence be given of the practice or custom in that respect. The more generally such practice shall prevail, the more necessary it would become for the courts to discountance and correct it by the severest condemnation and penalties."

The course of decisions from the *Genessee Chief*, 12 How., 443, 463, holding want of a lookout *prima facie* answerable for all consequences fairly imputable to such lack, to that of the *Belgenland*, 114 U. S., 355, 372, holding such navigation conclusive evidence of negligence has verified Judge Bett's prediction.

It is submitted therefore, that the supposed custom is illegal, unreasonable and excluded by the contract, and the evidence tendered was properly rejected.

III.

FOURTH ASSIGNMENT.

This complains of the court's refusal to instruct the jury as follows: "If the jury find that the Spartan, while navigating Lake Superior on June 19, 1883, and while a dense fog prevailed, was stranded on Caribou Island, and that the insurers were promptly notified of the disaster, and that proper proofs of loss were furnished to the insurers, then the plaintiff has made a case which *prima facie* entitles it to a verdict in this case."

This request falls little short of a prayer for an imperative instruction to find for plaintiff.

It asks the court to instruct the jury upon a part only of the evidence in the case, that "the plaintiff has made a case which *prima facie* entitles it to a verdict." This would have taken from the jury the decision of the questions of fact in the case, and narrowed the field of inquiry to the conceded facts recited in the request. It was the right and duty of the jury "to draw their conclusions, not from a part but the whole of the facts in the case."

Greenleaf vs. Birth, 9 Peters, 292, 299.
Scott vs. Lloyd, 9 Peters, 418, 445, 460.
Catts vs. Phalen, 3 How., 376, 382.
Smith vs. Condry, 1 How., 28, 35.
N. W. Ins. Co. vs. Muskegon Bank, 122 U. S., 502, 511-513.

The premises stated are merely selected and isolated circumstances, stripped and purged of every feature and incident which discredit their weight and effect.

Meagre and emasculated facts are by the request sought to be commended to the jury as presumptive evidence of defendant's liability, while the evidence of the cause and incidents of the stranding, viz: the speed of the steamer, the want of a lookout, the defects of the compass and all other condemnatory evidence coming *uno flatu* from the very witnesses who testifiy to the stranding, is by necessary implication ignored and excluded from their consideration as immaterial.

"The courts will not upon a view of the testimony which is partial or imperfect, give an instruc-

tion which the entire evidence in a cause when developed would forbid."

Rhett vs. Poe, 2 How., 457, 483.
Adams vs. Roberts, 2 How., 486, 496.
Ranney vs. Barlow, 112 U. S., 207, 214.

It was therefore not competent for the court to advise the jury as prayed, that stranding in the fog, followed by notice and service of proofs of loss *per se* raised a presumption of defendant's liability.

2. The direction prayed is not the legal result of the premises stated in the request. The liability of the insurers is neither necessarily nor even presumptively in law or in fact the corollary of stranding in a fog though followed by notice of the disaster, and service of proofs of loss on the insurers. The burden is still upon the insured of proving a loss from *a cause* and to an amount for which the underwriter is liable.

In *Bullard vs. Roger Williams Ins. Co.*, 1 Curtis, 149, Mr. Justice Curtis thus states the rule: "It is incumbent on the plaintiff to prove that these repairs were rendered necessary by some peril insured against in the policy. Even if you (the jury) are satisfied that the vessel was seaworthy at the beginning of the voyage, there is no presumption that the necessity for these repairs were occasioned by a peril insured against. *The burden is still upon the insured* to prove that *by some peril within the policy* the vessel received repairs requiring the expenditures shown by the surveyor's testimony." The learned justice further said that "the perils of the sea insured against include all damage done at sea to the vessel by the violence of winds and waves, as distinguished from

wear and tear, and from injury after the inception of the voyage because of unseaworthiness, under circumstances in which the master was guilty of negligence in not making her seaworthy."

Judge Story, in *Donnell vs. Columbia Ins. Co.*, 2 Sumner, 366, 372, 373, thus states the requirements of the plaintiff's proofs: "In every case in which the assured seeks to recover for such repairs (made in the course of a voyage) he must show, not only that they were proper and necessary *but that they became so from extraordinary perils within the policy.* The loss is like every other loss within the policy. The *onus probandi* is on the insured to establish it by competent and satisfactory proofs before he is entitled to recover."

This is the doctrine of *Union Ins. Co. vs. Smith*, 124 U. S., 424, 427, 428, where this court construing a like policy approved the charge: "that it must appear from the whole proof that the loss was *not* occasioned by the want of ordinary care of the master in charge of the vessel or on account of being unseaworthy, as hereinbefore stated, and not within the exceptions contained in the policy against which defendant did not insure plaintiff."

Equally pointed to the same effect are,

Cory vs. Boylston, Ins. Co., 107 Mass., 104-7.
Baker vs. Manufacturer's Ins. Co., 12 Gray, 603.
Heebner vs. Eagle Ins. Co., 10 Gray, 131.
Berwind vs. Greenwich Ins. Co., 53 N. Y., 253.
Same case affirmed in 114 N. Y., 231.
Sohier vs. Norwich Ins. Co., 11 Allen, 236.
Hicks vs. Fitzsimmonds, 1 Wash., C. C., 282.
2 Phillips on Ins., Sec. 2122.
2 Parsons on Marine Ins., p. 518.
2 Greenleaf on Evidence, Secs. 385, 387.

A fortiori: this is required where, as in this policy, there are many perils and losses not covered by it, and against which the plaintiff is its own insurer.

IV.

FIFTH ASSIGNMENT.

This is alleged on the refusal of the court to charge:

"The stranding of the Spartan on Caribou Island while a dense fog was prevailing, was accident, which is *prima facie* covered by the policy, and for which the insurer are *prima facie* liable."

The vice of the request is more flagrant than that of its predecessor. If the first lacked any element of a peremptory ruling on the facts, the second supplies the deficiency. "An accident which is *prima facie* covered by the policy," means that the stranding was presumptively one of "the perils of the lakes, rivers, canals," &c., insured against, and was not within the excepted risks.

If any such inference could be drawn from the evidence, it could only be done by the jury who were the sole judges of what the facts proved. The causes and character of the stranding was the very issue for the jury upon the whole evidence—if, indeed, that left it in doubt. The instruction prayed was clearly upon the weight and effect of the testimony—not a ruling upon the terms of the policy. The legal presumption from the facts is violent to the contrary of the instruction prayed. Certainly, it would be against a carrier sued for a loss under like circumstances, and

as argued hereafter there is no difference between "perils or accidents of the seas" in a bill of lading, and same terms in the policy sued upon.

In *Bazin vs. The Steamship Co.*, 3 Wall., 229, 238, libelant sued for the loss of merchandise laden on the steamer City of Philadelphia, under a bill of lading which absolved the carrier from "accidents from machinery, boilers, steam, or any other accidents of the seas, rivers, and steam navigation of whatever nature or kind whatever."

The steamer was wrecked on Cape Race in a snow storm. The only account given of the loss of the vessel was as follows: "She struck the point of Cape Race; up to that time she continued perfectly seaworthy. If she had not struck, at the average of our rate we should have been in Philadelphia in five days. The steamer was wrecked. We backed off the point of Cape Race, and ran her on shore to save the lives of the passengers, and to keep her from sinking. There was no tempest. She struck in a dense fog The sinking of the vessel and the damage done, resulted from striking the Cape."

On this narrative, Justice Grier says: "Here, then, we have no other reason given by the captain nor any testimony whatever as to how or why this great mistake of running against a cape occurred.

The answer and the witness both seem to assume that running against the cape or a continent is one of the usual accidents and unavoidable dangers of the seas. That cannot be termed an '*accident of the sea*,' within the exceptions of the bill of lading, which proper foresight and skill in the commanding officer might have avoided. If the compass on the

new iron vessel was not sufficiently protected to traverse correctly, the vessel was as little sea-worthy as if she had no compass,—and this should have been carefully ascertained before she started on her voyage. If there was no fault in the compass, then it is very evident that the officer who is thirty or forty miles wrong in his calculation, and driving through a thick fog at a full head of steam, and first discovers his true position by running on an island, a cape or a continent, has neither the skill nor the prudence to be entrusted with such a command, and for want of such an officer the vessel is not sea worthy. * * * * That a steamboat has been either ignorantly, carelessly or recklessly dashed against a cape in a thick fog, cannot be received as a plea to discharge the carrier."

Despite, however, the undisputed evidence of the agency of gross negligence and almost conceded unsea worthiness in causing the stranding, and though there was no legal evidence justifying the instruction the learned judge charged the jury. (Rec., p. 66.)

"Now, gentlemen, if you find that she was carried ashore by the current, or any mysterious cause which you are unable to explain, the loss will be within the policy, and the plaintiff will be entitled to recover." And again, (p. 66,) on the other hand if you find that the loss occurred from a peril of the sea, and from no want of skill in navigation, and from no want of competency of the master, or sufficiency of the crew, and from no fault on the part of the vessel, your verdict should be for the plaintiff."

This last instruction the judge repeated, (Rec., p. 72,) adding: "if she was stranded by circumstances —by reason of the current or by peril of the sea—any

other peril of the sea—then plaintiff would be entitled to your verdict."

The charity that "thinketh no evil, believeth all things and hopeth all things," was never more strongly commended to a jury than by these benevolent conjectures which, ignoring the admitted agencies of the loss, invite the jury to refer it to causes, one of which the undisputed testimony of the master refutes. "There would not be any current at all with such a wind as we had that night," (Rec., p. 40,) and others, mysterious and unexplainable, of which there was no evidence. If there was any error in refusing the plaintiff's second request, it was fully healed by the charge.

V.

SIXTH ASSIGNMENT.

This is founded on the court's refusal to charge:

"If the jury find that the fog contributed approximately to the stranding of the Spartan, then the insurers are liable for the loss caused by such stranding."

That is to say, that if they should find that but for the fog the island would have been seen in time to avert the stranding, the jury need inquire no further into the causes and circumstances of the stranding, be the evidence never so cogent of the agency of negligence, unsea-worthiness, barratry, etc., in producing the loss—the fog shut out of view both the island and the evidence, and fixed the liability of the insurers.

If this request was preferred as a construction of the policy, it not only nullifies its every exception, but leaves no limit to the insurers' contract. It would make the exception read: "Excepting all perils, losses, misfortunes and expenses (occurring in clear weather) caused by * * * * consequent upon or arising from want of ordinary care and skill in navigating said vessel, incompetency of the master * * * and all other unsea-worthiness, barratry," &c.

The contract of the insurer is against losses by "perils of the lakes, rivers and canals," &c., limited by excepting therefrom those specified in the policy.

The term "perils of the seas," has the same meaning in policies of insurance and bills of lading.

Wilson vs, The Owners, L. R. 12 App. Cas., 503.
Hamilton vs. Pandorf, L. R., 12 App. Cas., 515, 525.

And "whether understood in its most limited extent as importing only a loss by the natural accidents peculiar to that element, or whether understood in its more extended sense, as including inevitable accidents on that element, must still, in either case, be clearly understood to include only such losses as are of an extraordinary nature, or arise from some irresistible force, or some overwhelming power which cannot be guarded against by the ordinary exertions of human skill and prudence."

The Reeside, 2 Sumner, 571.
Liverpool S. S. Co. vs. Phoenix Ins. Co., 129 U. S., 428.

The exceptions in this policy expressly give the insurer the same protection against the excepted perils that the law accords to the shipper under a bill of lading, viz: immunity from loss to which the negligence of the carrier or his servants has contributed. When such negligence is shown, the law refers the loss to that fault, though there be a co-operating sea peril.

The Portsmouth, 9 Wall., 682, 684.
Lawrence vs. Minturn, 17 How., 100. 111.
General Mut. Ins. Co. vs. Sherwood, 14 How., 365.

But were the law otherwise as to the legally responsible cause of loss, the court could not properly give such an instruction, which makes the case turn on one point only, when as here, there are other grounds to be passed upon by the jury, the evidence of which would thus be practically withdrawn from them.

Adams vs. Roberts, 2 How., 486, 496.
Ranney vs. Barlow, 112 U. S., 215.

Yet, lest the amenability of the insurer for a loss by stranding should escape the jury, his honor, in the excess of his caution, instructed them, at plaintiff's request, (Rec., p. 69,)

"Stranding, is one of the perils insured against in the policy, and if the jury find that the stranding was the proximate result of the fog or currents of the lake prevailing, then the owners of the steamer have made a case which entitles them to your verdict."

If there is any aspect of the plaintiff's first, second and third requests, short of summarily directing a verdict in plaintiff's favor, not embodied in this charge, its scope is entirely misapprehended.

VI.

SEVENTH ASSIGNMENT. (REC., P. 84.)

This is predicated on the refusal of the plaintiff's fourth request. Except its conclusion, every part of this request was covered by the charge—in part almost literally.

The first part of the request prays the instruction, "There is no evidence in the case which even tends to show the unsea worthiness of the Spartan, except in regard to her compass."

This assumption is erroneous in fact and in law.

The conceded want of a lookout, was also unsea-worthiness. "The requirement of sea-worthiness extends especially, and in all particulars to the officers and crew of a ship. There is, we think no doubt, that by this requirement, owners of vessels are not only bound to have a full complement of men and officers on board, but they must have men and officers of competent skill and experience to perform their duties intelligently and understandingly, under all circumstances and in all emergencies."

1 Parsons on Marine Ins., 374.
Prop. Niagara vs. Cordes, 21 How., 23.
Chamberlin vs. Ward, 21 How., 570.

In the case of John Fretter, cited in the Armstrong, Brown's Adm., 130, 135, Justice Swayne said: "The want of a look-out is a fault of the grossest description. * * * A crew is not competent without a look-out on either tugs or steamers." Yet, the court charged the jury: (Rec., p. 65:) "There is *but one* defect in

this connection," (i. e. the unsea-worthiness of the steamer,) "to which it is necessary to call your attention, and that is the want of a proper compass."

Submitting that this instruction is the full equivalent of that prayed, and that it is erroneously favorable to plaintiff, in that it told the jury there was but one defect in the sea-worthiness of the steamer, it is certain that the plaintiff can not complain of it.

Again, the learned judge charged : (Rec., p. 70 :)

"The steamer is presumed to have been sea-worthy, and that her officers were competent to navigate her, and the insurers are not entitled to a verdict on account of unsea worthiness, unless they prove by preponderance of evidence that she was unsea-worthy, subject to the presumption of unsea-worthiness raised by her running 17 miles out of her course, which devolves on plaintiff to explain."

This qualification as to the burden of explaining the deviaton was correct. The steamer *Webb*, 14 Wall., 414, 415, 416.

Again, (Rec., p. 66,) the jury were instructed : "On the other hand it is shown that the vessel had navigated from Owen Sound up to Sault Ste. Marie, and from the Sault up to Port Arthur with this compass, and that no unusal deviation had been detected, except that the captain thought the compass was a little slow, as he said."

Again, his Honor, emphasied the fact of the use of the compass, (Rec., p. 70,) thus :

"I charge you, as requested by the plaintiff in his eighth request, that the jury are entitled to consider the fact that the Spartan had been successfully navigated by this compass during the season, up to

the time of her stranding, and that on her final trip, she had made a good course from Port William to Silver Island, and from Silver Island to Passage Island, and that she was upon her usual course when she passed the Quebec, as evidence tending to show that the officers had reason for believing that the compass was a proper one, and to rebut the charge that they were negligent in using that compass."

These extracts demonstrate that the pith and marrow of the fourth request, were fully covered and reiterated in this charge.

Its hypotheses, that "if the jury find that the compass did not vary more than vessel's compasses ordinarily do," * * * "and that the officers of the steamer at the time she started upon the voyage on which the stranding took place believed the compass to be reliable, and had reason for such belief," are not sustained by the evidence. Capt. McGregor testified, (Rec., p. 37,) that "the compass was defective," "more or less; it was, running in opposite courses;" "that when the protest was signed, he had the words, 'fogs and defective compasses,' inserted in the protest;" that "the loss was occasioned by a defective compass or fogs;" (Rec., p. 38;) that he had experienced on previous trips no more variation than we generally do on iron vessels; "another compass on that vessel might be just the same, and different on wooden vessels." (Rec., p. 39.) "There was a little variation." (Rec., p. 40.) That his mates "knew there was a variation;" "I suppose there was some local attraction;" that the stranding must be attributed "to the compass or some other cause aboard the vessel."

Q. "You mean attraction by the hull of the vessel?"

A. "Yes, sir. That all compasses on Lake Superior vary more or less at different points, * * the variation differs with the * * * direction or course which the vessel is running." "It does on almost all iron vessels." (Rec., p. 41.) That "it (a compass) varies differently in different parts of Lake Superior."

Q. "*You can't tell the extent of the variation?*"

A. "*No.*" (Rec., p. 44.)

Q. "Running on a course up, as you went up that trip, would be no test of the correctness of the compass on the down course?"

A. "I don't know that it would."

"COURT. Did you discover any difference in the compass on former trips?"

"A. A little difference from some other vessels. For instance, the Chicora was very much different." (Rec., p. 45.)

"Q. *What trip was it that you found the compass out?*"

"A. *That was in the other channel.* Every vessel I was on, varied there in the same place." (Rec, p. 45.)

Wagner, the first mate, testified, (Rec., p. 56,) that the compass was "a little out."

"Q. State whether the master knew of this defect?"

"A. *He spoke to me about it, and said it was a little out; it was not like his other compass he had on the Smith; he was making her courses as fast as he went over the route; he said it was a little out.*"

That "they (compasses) all vary up there. Those that have not been adjusted, vary more at certain points than others; *a compass that has been adjusted should not vary at all; that he did not know how much the variation of the compass was;* that he steered the small boat by that compass after the stranding, on a S. E. by E. course, *and brought up 40 miles from the point for which he steered;* the course actually run must have been 1-2 south, or something like that, judging from where she fetched up." (Rec., p. 57.)

The master and mate, therefore neither "believed the compass to be reliable, nor had reason for such belief."

Patterson, the charterer's manager, says, (Rec., p. 48,) that there is more attraction on an iron than on a wooden vessel; that, to meet and obviate this, it is usual to adjust compasses; *that this compass had never been adjusted; that the Spartan had been fitted out by plaintiff.* (Rec., pp. 47-8.)

The steamer, therefore, was neither sea worthy at the inception of her voyage, nor when she was chartered. The negligence of the master in running the steamer by a compass known to be erratically defective "discharges the insurer from any loss which is the consequence of such want of prudence or diligence."

Union Ins. Co. vs. Smith, 124 U. S., 427.

And the neglect of the charterer to take the confessedly usual precaution of having it adjusted also bound the plaintiff.

Williams vs. The New England Ins. Co., 3 Cliff., 244.

As under the policy the defendant "is released from such losses as are consequent upon, and arise from, or are caused by any of the specified excluded causes,"

Union Ins. Co. vs. Smith, 124 U. S., 426,

the court did plaintiff's case full justice by the instruction "that the insurers are not entitled to a verdict on account of unsea-worthiness, unless they prove by a preponderance of evidence that she was unsea-worthy," &c. (Rec., p. 70.) This was the full equivalent of the request.

VII.

EIGHTH AND NINTH ASSIGNMENTS.

These involve the refusal of plaintiff's fifth and sixth prayers and may be considered together. Both assume as facts, matters of which there is literally no evidence, and which are disproved by the record.

1. The "sue and labor clause," of the policy (Rec., p. 76) reads thus: "It is agreed that the acts of the insured or insurers, or their agents, in recovering, saving and preserving the property in case of disaster, shall not be considered a waiver or an acceptance of an abandonment, nor as affirming or denying any liability under this policy, but such acts shall be considered as done for the benefit of all concerned without prejudice to the rights of either party."

The record shows that the master sent the insurers a request for assistance, (Rec., p. 35); this was received by the insurers, June 22, (telegram, Rec., p. 61,) and that in response thereto the wrecking expe-

dition left Detroit the next day and reached the Spartan, June 25th, (Rec., p. 59,) one day *before* the telegraphic notice of abandonment was sent to Perry. (Rec , p. 67.)

These undisputed facts conclusively repel the implication of the request that the insurers sent the wrecking expedition *after* notice of abandonment. The "sue and labor clause," gave them the right to send aid, before or after abandonment, but nothing in the policy or the law of insurance requires them to notify the owner before complying with the request of the master for assistance. The policy makes it the primary duty of the insured "to make all reasonable exertions in and about the defense, safeguard, and recovery of the vessel without prejudice to this insurance," and in case of the owner's neglect so to do, authorizes the insurer "to interpose and recover" her. (Rec., p. 76.)

2. The statement "that Captain Swain brought her (the steamer) to Detroit for repairs, and was paid for so doing by the insurers," implies that the *insurers* caused her to be taken to Detroit *for repairs*. The undisputed evidence of Capt. Swain is that he had "no orders where to take the steamer when she was got off," (Rec., pp 59, 60,) and Swain and Wagner, both testify that the steamer was towed to Detroit under the orders of her master. While Capt. McGregor denies that he gave such orders; Swain's testimony as to his own authority and its limits, is conclusive that the Spartan was not brought to Detroit by the order of the insurers. (Rec., pp. 60, 61.) That the insurers paid the wrecking expedition would not commit them to acceptance of the abandonment.

It was an act done for the benefit of all concerned, and without prejudice to the rights of either party. (Rec., p 76.)

3. There is no evidence that "the steamer was subsequently surveyed for repairs *by the insurers*." The survey was held by the joint act of the charterer and the insurers (Rec., p. 35). The charterer was as between the insurer and insured, the agent of the owner.

Williams vs. New England Ins. Co., 3 Cliff., 244, 250.

Presumptively the survey was held to enable the *insured* to repair, as was primarily its right and duty under the very terms of the policy (Rec., p. 75).

The insurer could not repair until the insured should neglect or refuse to do so.

4. The fact that the steamer was repaired and the claim that "the owners never interfered with the making of the repairs," are neither of themselves, nor in connection with the other matters recited in the request, evidence of an acceptance of the abandonment. There is not a scintilla of evidence that the insurers directly or indirectly ordered any repairs. The testimony of plaintiff's witness Parker, superintendent of the dry dock, is uncontradicted that the master of the Spartan engaged the dock, and "had something to do with ordering the repairs;" that Elliott and Megann representing the charterer ordered work done not necessitated by the stranding (Rec., p. 46). McGregor admits that he got paint for the steamer (Rec., p. 43), and there is evidence that other work and repairs were put on the steamer not made necessary by the stranding (Rec., p. 61). The evi-

dence therefore, excludes the connection of the insurers with the repairs, and necessarily disproves the correctness of the instruction prayed. Repairs ordered by the charterers do not even tend to show an acceptance of the abandonment by the insurers.

The erroneous assumptions of the ninth request are reiterations of those in the eighth. The evident effect of both would have been to mislead the jury into the belief that the expedition for the recovery of the steamer was sent *after* the alleged abandonment, and that as a matter of law the mere fact that the steamer was repaired without notice to the plaintiff, *no matter by whose authority this was done*, was competent to charge the insurers with acceptance of the abandonment. It is submitted that for the reasons more fully stated in commenting on the eighth assignment that the premises of both requests are erroneous in fact and their legal conclusions are unsound.

VIII.

TENTH AND ELEVENTH ASSIGNMENTS.

These are respectively the refusal of plaintiff's seventh and eighth requests, viz:

"10. If the jury find that the insurers sent the wrecking expedition to the Spartan with the intention of rescuing and repairing her without consulting the plaintiff, then it was the duty of the insurers, within a reasonable time, to tender her back to the owners free of all liens for such repairs. Their failure to do so is evidence of an acceptance of abandonment and their liability to pay as for a total loss."

"11. If the jury find that the insurers brought the Spartan to Detroit with the intention of repairing her, and that she was subsequently repaired without interference on the part of the plaintiff, and that the insurers failed to pay for said repairs but allowed the steamer to be libeled and sold by the court of admiralty to satisfy the lien for such repairs without notice to the plaintiff, then this would amount to an acceptance of the abandonment."

These are not sustained by the evidence:

1. There is no evidence whatever that the insurers sent the wrecking expedition "with the intention of rescuing *and reparing* her," (the steamer). As already stated, the expedition was sent, in response to the master's request for aid, "to rescue the steamer" and that was the limit of its employment and authority.

McGregor, Rec., p. 35.
Swain, Rec., p. 60.
Crosby, Rec., p. 61.

And the evidence is undisputed that the master and the charterer ordered the repairs. There is no evidence that the insurers interfered with or exercised any control over the recovery or repair of the steamer.

2. There is no evidence that the insurers "allowed the steamer to be libeled and sold by the court of admiralty to satisfy the lien for repairs," as assumed in the eighth request. (Eleventh assignment.)

The premises for both of the requests under discussion being entirely wanting, the instructions prayed were properly refused.

"It is not allowable to assume as existing, facts not proved, and ask a direction to the jury on such assumption."

Railroad Co. vs. Gladden, 15 Wall., 409.
New Jersey Mut. Ins. Co. vs. Baker, 94 U. S., 611.
Ins. Co. vs. Foley, 105 U. S., 353.

Both these requests were attempts to bring this case, regardless of the facts, within the case of

Insurance Co. vs. Copelin, 9 Wall., 461.

There the trial court, sitting without a jury, found as facts, that the insurers took possession of the boat for the purpose of raising and repairing her; that the repairs made were insufficient and not made within a reasonable time, and on these grounds and because the loss was within the policy, held the insurers.

There is no analogy between the case at bar and *Insurance Co. vs. Coplin.*

It is submitted that there was no error in refus- the eighth request, for the further reason, "That the underwriters are not bound to supply funds in a foreign port for the repairs of any damage to the ship occasioned by peril insured against. They undertake only to pay the amount after due notice and proof of the loss, and usually this is to be done (as was the fact in the present case,) after a prescribed time from such notice and proof of the loss."

Bradlie vs. The Maryland Ins. Co., 12 Peters, 378, 404, 409.

The case further holds that a loss by sale especially where as heret he underwriters were not liable for all the repairs, is as much attributable to the neglect of the owner as the insurer, and the owner cannot thus convert a partial into a total loss."

Much less can the owner thus cast upon the insurer the consequence of an excepted peril errone-

ously represented by the insured to the insurer as within the policy.

Hoxie vs. Home Ins. Co., 32 Conn., 40, 41.

IX.

TWELFTH ASSIGNMENT.

This is alleged on the refusal of the plaintiff's ninth request; "If the jury find there was an actual or constructive acceptance of the abandonment then the plaintiff is entitled absolutely to recover as for a total loss."

There is absolutely no evidence that the insurer actually, i. e., expressly accepted the alleged abandonment. No witness so testifies. No document except the telegraphic notice of abandonment, (Rec., p. 67,) and the proof of loss (Rec., p. 79,) mentions or refers to the abandonment directly or indirectly. The insurers said nothing and did nothing, and this of itself was a refusal of the abandonment.

Peele vs. Merchants Ins. Co., 3 Mason 27, 81.
2, Parsons on Mar. Ins., 177.

The proposition which the court was asked to sanction assumes that there was evidence of both an actual and a constructive acceptance. Unless there was evidence of both "the plaintiff cannot assign for error, the refusal of an instruction to which he has not the right to the full extent stated, nor is the court bound to modify the instruction moved for by counsel so as to bring it within the rules of the law."

Haffin vs. Mason, 15 Wall, 674.

He must be entitled to have the instruction granted in its precise terms.

Catts vs. Phalen, 2 How., 382.

"If a request to charge contains one unsound proposition it is not error to refuse to make the charge though it contains many sound propositions."

Transportation Co. vs. Hope, 95 U. S., 301.

For this reason alone this request was rightly refused.

The record is equally barren of evidence of a constructive acceptance. Such an acceptance is a matter of construction of the insurer's words and conduct.

2 Phillips on Insurance, Sec. 1692.

No witness testified to any statement or act of the insurers or their agent, by which the insured was led to suppose that the insurers had any thought of acceptance, or did any act which by possibility could be referred to an acceptance.

There is no evidence that the insurers dealt or contracted with the Dry Dock Company. Crosby's testimony (Rec., p. 61) is undisputed, that "he gave no orders or instructions to any person or persons as to the repairs on the steamer, nor did he assume any responsibility therefor." The Dry Dock Company demanded its pay from the charterer, (Rec., p. 50,) doubtless because the charterer had ordered the work.

Milloy, plaintiff's manager, Megann, the charterer's treasurer, and McGregor, met Crosby in October, 1883, and he again refused to pay the duties charged by the Canadian government on the repairs, as he

had to Patterson and Perry (Rec., p. 51). Milloy, Megann and Patterson insisted that the insurers were liable for these duties which could only be possible because the duties were a charge imposed by the disaster on the steamer *as still the plaintiff's property* and *as such* liable to Canadian duties. That claim could not have been possible if the insurers had accepted the abandonment. From June 26, the date of the telegraphic notice of abandonment to November 3d, the date of the proofs of loss, Ex. "B," (Rec., p. 79,) no claim of total loss was made in any of the frequent interviews shown by the record. Even the claim in the proofs of loss Ex. "B," was treated as formal merely, for the evidence of Crosby, (Rec., p. 46,) is undisputed that as late as March 24, 1884, the duties and the fact that the repairs exceeded the survey, still divided the parties. No claim for total loss, or predicated on the alleged abandonment seem to have been mentioned. Not only, therefore, is there no evidence of constructive acceptance of an abandonment, but the proof is plenary that the insured waived the notice of abandonment and negotiated for payment of a partial loss. The steamer remained in charge of Captain McGregor who engaged the dock, (Rec., p. 60,) ordered and superintended her repairs, (Rec., p. 61,) and purchased material, (Rec., pp. 43, 44,) as is shown by the uncontradicted testimony of Crosby and Swain, and his own admissions.

X.

THIRTEENTH ASSIGNMENT.

This alleges error in the instruction:

"The law of Canada provides that all vessels shall run in a fog at a moderate rate of speed; and I do not undertake to direct you one way or the other in this regard—that is, the rate of speed, but merely to say in general terms, that if you find the loss was occasioned by the excessive speed of the vessel or by her want of a lookout or by the defect of the compass, the defendant is not liable."

The statute of Canada was proved as a fact without objection (Rec., p. 61). It bound the plaintiff, the charterer and the master and crew of the Spartan, as subjects of Canada, and the steamer as Canadian property navigating Canadian waters at the time of the stranding. There is no intimation that the violation of the statute was the cause of the stranding. That question was left to the jury with a strong intimation in favor of the plaintiff thus expressed:

"Now, it strikes me—but the question is one for your determination—that a vessel is not under obligation while navigating the open lakes to slacken her speed in a fog, unless there is some reason to apprehend collision with another vessel, or unless the vessel is so near the shore or known to be so near the shore that she might run upon it unless she was navigated at a less rate of speed, and if this compass had been a proper compass, and there was no reason to think it was otherwise, I should feel loath myself to charge the vessel with fault on account of excessive

speed. On the other hand, if this compass were known to the captain, or he had good reason to believe it was defective, then it would strike me that in passing the neighborhood of Caribou Island, he should have directed the speed of the vessel to be slowed. But as I said before, gentlemen, that is a question for your consideration." (Rec., p. 66.)

All this part of the charge just quoted, was given between the words "speed" in the second line of this assignment, (Rec., p. 85,) and the remainder of the assignment, but is omitted. The specification, therefore, is not in compliance with paragraph 2 of rule 21, of this court, requiring that "the specification shall set out the part (of the charge) referred to *totidem verbis*."

The charge cannot be thus mutilated. Its whole scope and bearing must be considered.

Spring Co. vs. Edgar, 99 U. S., 659.

It is impossible to say with certainty what part of this instruction the plaintiff assails.

Upon the surmise that the reference to the statute is the objective point, and that it will be argued that the act is intended only to prevent collisions, it is submitted that "moderate speed in a fog" is as much within the purview of the statute as a precaution against stranding as against collision. Its title leaves no doubt of its purpose—"An act to make better provisions respecting the navigation of Canadian waters." That purpose is defeated if a steamer can, in a fog, rush at full speed onto an island, and escape the penalties of article 24, and paragraph 7, of the statute (Rec., p. 62). The statute does not invite the

drowning of passengers by stranding while forbidding the risk of the same fate by collision with another vessel.

Par. 7, declares explicitly that in case "*any* damage to persons or property arises from the non-observance by any vessel or raft of *any of the rules prescribed by this act*, such damage shall be deemed to have been occasioned by the wilful default of the person in charge of such raft or of the deck of such vessel at the time, unless the contrary be proved," * * * &c., and makes "the owner of the vessel or raft in all civil proceedings," * * * "subject to the legal consequences of such default." See also Article 24. (Rec., p. 62.)

The statute was copied almost literally from the Merchant's Shipping Amendment Act of Great Britain. (1854.) Part IV., Tit. Safety, Sec. XXVIII, XXIX. of that Act, are the prototypes of Sec., 7 and 6, respectively, of the Canadian Statute. Article 24, (Rec., p. 62,) is an exact reproduction of Article 20 of the British Regulations of 1863.

In the case of the *Kestrel*, L. R. 6, Prob. Div., 182, 185, the British Act was treated as obligatory in a proceeding to suspend the certificate of the master of a vessel for negligently stranding her.

See also opinion of Judge Brown. (Rec., 26, 28.)

Billings vs. Breinig, 45 Mich., 65, 71.

It is submitted that the instruction was correct.

XI.

FOURTEENTH ASSIGNMENT OF ERROR.

That part of the charge referred to by this assignment, is as follows:

"With regard to the defective compass, the master and crew state in their protest that they attributed the loss to a defective compass, and while that statement is not binding upon the plaintiff, and while the plaintiff is not estopped, as we say, or prevented from showing that the loss is attributable to other causes, it is undoubtedly entitled to considerable weight."

No objection was made to this instruction, because the judge failed to quote literally the language of the protest, nor did plaintiff's counsel ask the court to modify this statement of the tenor and purport of the protest. The fact stated by the court was, to its full extent, so repeatedly emphasised by the master and the two mates who signed the protest, (McGregor, Rec., p. 37, 39, 40; Harbottle, Rec., p. 55; Wagner, p. 56) that the plaintiff suffered no injury, because the court used the language of its signers when on the stand as witnesses, rather than the words of the instrument. But one inference could be drawn from the protest, that "from the course taken, the steamer should have passed seventeen miles to the southward of Caribou Island," followed as this is by the special protest, interlined at the master's request, (Rec., p. 37,) against "fogs and defective compasses." Plaintiff having failed to re-

quest correction of the trifling inaccuracy, cannot now complain.

Spring Co. vs. Edgar, 99 U. S., 659,

There was no error in the court's comment on the weight to be given to the protest. The jury were left entirely free to determine the cause of the loss, and in the same connection—the next sentence—the court reminded the jury that the vessel had been safely navigated with the same compass on previous occasions.

Rucker vs. White, 127 U. S., 85, 93.
Lovejoy vs. U. S., 128 U. S., 173.
U. S. vs. Reading R. R., 123, U. S., 113.

XII.

FIFTEENTH ASSIGNMENT.

The first sentence of the instruction complained of under this assignment either states the law correctly or there is no virtue in the exceptions in the policy. If the loss was caused by the defective compass, it was a loss by unsea-worthiness, and under the evidence of the master and first and second mates, a *known* unsea worthiness. Had the variation of the compass been known or constant there might have been some excuse for trusting in it, under ordinary conditions. The master testifies (Rec., p. 57,) "that he did not know how much the variation of the compass was," and the master said "that he could not tell the extent of the variation." (Rec., p. 41.) Under such acknowledged circumstances there can be no doubt that failure to have this compass adjusted so as to be reasonably safe for navigation, was negli-

gence aggravated by using it without any of the usual precautions to insure against its errors, and which common pudence enjoined even with a perfect compass.

To the rest of the instruction under discussion, plaintiff can make no possible objection. It left the jury free to imagine some peril of the seas as to the cause of the disaster, in the teeth of the evidence of every actor in the disaster.

XIII.

SIXTEENTH ASSIGNMENT OF ERROR.

The subject of this assignment has been considered under the fourth and fifth assignments. The burden was upon plaintiff to show that the stranding and its consequent losses and expenses were caused by perils insured against.

See cases cited supra.

XIV.

SEVENTEENTH ASSIGNMENT OF ERROR.

The charge, that "under the evidence in the case, the burden of proof is upon the plaintiff to show that the stranding of the steamer could not have been guarded against or prevented by the ordinary exertions of human skill and prudence," is unassailable. Against "all perils, losses, misfortunes or expenses consequent upon, and arising from, or caused by * * * * want of ordinary care and skill in navigating said vessel," the plaintiff was its own insurer. To use the language of the learned district judge, (Rec.,

p. 28,) "The exception is not only of 'all losses and misfortunes,' but of all '*perils*' caused by negligence. The inference from this is, that the company would be exonerated notwithstanding the immediate loss be by a peril of the sea, if such peril arose from negligence or unsea worthiness."

If the danger might thus have been avoided, it is plain that the loss should be attributed to negligence and inattention.

Transportation Co. vs. Downer, 11 Wall., 133.

Though a tug is liable only for want of ordinary care and skill in towing, circumstances much less cogent of negligent navigation and unseaworthiness were held to cast upon her the burden of exculpating herself from a disaster apparently attributable in part to a defective compass.

The Steamer Webb, 14 Wall., 415.

There being no presumption that the loss arose from perils insured against, the *onus probandi* is upon the plaintiff to bring it within those perils. *A fortiori* under this policy and the confessed circumstances of the stranding.

To those circumstances the instruction made no reference beyond the using the phrase "under the evidence," which the court had repeatedly commended to the jury as permitting a verdict for plaintiff. If it was possible to find that this disaster could not have been prevented by ordinary care and skill, nothing in the instruction obstructed that conclusion.

XV.

EIGHTEENTH ASSIGNMENT OF ERROR

The charge covered by this assignment was as follows :

"As the Spartan was violating the laws of Canada in running at full speed in a dense fog, plaintiff must show affirmatively that neither the speed of the steamer nor the defect of the compass could have caused or contributed to cause the stranding of the steamer, and the burden of proving a loss of this kind is upon the plaintiff. There is no presumption that the loss was occasioned by a peril insured against by the defendant."

The only part of this instruction not covered by what has been said, is the effect given to the violation of the statute in requiring plaintiff to show that neither the speed of the steamer nor the defect of the compass could have caused or contributed to the stranding.

This ruling is in strict accord with that laid down in

The Pennsylvania, 19 Wall., 125, 136

Of a collision it is there said, "But when as in this case, a ship at the time of a collision is in actual violation of a statutory rule intended to prevent collision, it is no more than a reasonable presumption that the fault, if not the sole cause was at least a contributory cause of the disaster. In such a case the burden rests upon the ship of showing, not merely that her fault might not have been

one of the causes, or that it probably was not, but that it could not have been."

To the same effect are:

Hayes vs. M. C. R. R. Co., 111 U. S., 228.
The Fenham, L. R., 3 P. C., 212, 216.
The Voorwarts and Khedive, L. R., 5 App. Cas., 894, 900.
The Northern Indiana, 3 Blatch., 93.
The Leo, 11 Blatch., 225, 232.
Taylor vs. Harwood, Taney R., 437, 444.
Gray's Ex'r vs. Mobile Trade Co., 55 Ala., 387.
Jetter vs. N. Y. & N. H. R. R., 2 Keyes, 154.
Levi vs. New Orleans Ins. Association, 2 Woods, 63, 67.
Citizen's Ins. Co. vs. Marsh, 41 Penn. St., 396.

Independently of the statute the law would refer the disaster to the fault of the vessel, under the conceded conditions of its occurrence. "It is well settled that if a jettison of a cargo or a part of it is rendered necessary by any fault or breach of contract of the master or owners of the vessel, the jettison must be attributed to that fault rather than to the sea peril, though that may also be present and enter into the case. This is a principle alike applicable to exceptions in bills of lading, and in policies of insurance. Though the peril of the sea may be nearer in time to the disaster, the efficient cause of, without which the peril would not have been incurred, is regarded as the proximate cause of the loss."

The Portsmouth, 9 Wall., 682.

The statute, in terms, and the consensus of the highest courts require and approve the ruling that plaintiff had the onus of disproving the inference that the law has attached to the confessed circumstances

of this stranding. The evidence of Wagner is uncontradicted that "if the Spartan had been running at half speed they might have backed her off," (Rec., p. 56). The concurrent testimony of all the officers attributing the deviation of seventeen miles to the compass is not met by anything but a halting surmise of a possible deflecting current, the existence of which is positively denied by the author of the conjecture. Capt. McGregor says: "*There would not be any current at all* with such a wind as we had that night." (Rec., p. 40.) The evidence therefore justified the instruction which on its face kindly assumes, contrary to the fact, that there was evidence which might suffice to exempt plaintiff from the statutory presumption. The instruction, therefore, was more favorable to plaintiff than the evidence warranted.

XVI.

NINETEENTH ASSIGNMENT OF ERROR.

The charge that: "If there were any defects in the compass known or unknown, rendering it unsafe for use in Lake Superior, and the stranding of the vessel was caused by, or consequent upon, or arose from such defects in the compass, the vessel was not seaworthy for Lake Superior navigation, whatever her fitness for navigation elsewhere, (and) the plaintiff cannot recover."

It is justly remarked by the learned judge in his opinion on the motion for a new trial, (Rec., p. 31,) "It may be assumed that there is no implied warranty of seaworthiness in a time policy, and the mere fact that the vessel was unseaworthy would not preclude a

recovery in case of a loss unconnected with the defect, but the policy contains an express exception of liability for losses occasioned by this cause and whether it was known or unknown would be immaterial. The exception amounts to a warranty that the loss shall not be caused by unseaworthiness and the ignorance of the owner of the defect in the compass would not affect his right to recover."

Citing:

The Glenfruin, 5 Asp., 413.
" " L. R., 10 Prob. Div., 103.
Work vs. Leathers, 97 U. S., 379.
1 Parsons, on Marine Ins., 337, 368.

See also

Qhebec Marine Ins. Co. vs. Commercial Bank, L. R., 3 P. C. C., 234, 242.

This court has so construed the same exceptions in

Union Ins. Co. vs. Smith, 124 U. S., 427.

The testimony of Capt. McGregor and Mr. Wagner, leaves no doubt that the compass was known to be defective on former trips. (Rec., pp. 45, 56, 57,) As the plaintiff fitted out the steamer, (Rec., p. 47,) and this compass had never been adjusted, though it was usual to do so, (Rec., p. 48,) the Spartan was neither seaworthy at the inception of the risk nor at the time of the stranding.

On these undisputed facts it is submitted therefore that there is no possible ground of complaint against the instructions which left the facts entirely to the jury.

SUPPLEMENT.

It has been assumed that as the plaintiff has filed assignments of error, all objections to rulings not included in the assignments are waived.

Phillips Construction Co. vs. Seymour, 91 U. S., 648.

If wrong in this view there remain some exceptions not discussed nor assigned for error, which we believe are not sustainable.

1. Rec., p. 39, the question is asked on re-direct examination of Captain McGregor:

"Q. When you speak about the defect in the compass contributing to the stranding, what do you mean?"

This was properly excluded. The witness had testified explicitly and in unmistakeable terms that "the loss was occasioned by a defective compass or fogs, or the compass and currents." (Rec., p. 37.) His meaning was left in no possible doubt. The question was simply a bid for a qualification of his cross-examination. All his knowledge of the compass and its agency in the loss was repeatedly elicited, (Rec., pp. 38 46.) and the ruling excluded no evidence relevant to the issue.

2. The evidence offered (R., p. 53,) for the purpose of showing the amount due to the Dry Dock Company for the repairs furnished to the Spartan, &c., was rightly rejected. It was not the best evidence of that amount, nor was it relevant to the issue. It was *res inter alios acta*. To that suit the insurers were not parties. They could not even intervene to defend the action.

The Ship Packet, 3 Mason, 255, 257.
The Schooner Boston, 1 Sumner, 328, 333.

They did not order the repairs, and until it was established that they were necessitated by a peril insured against had no concern with them. The Record, p. 36, shows the cost of repairs and the amount of the loss. Whether anything was still due the Dry Dock Company for those repairs was equally incompetent against the defendant.

3. Plaintiff's additional offer (Rec., p. 53,) "to show the fact that the Spartan was seized by the process of the district court, and condemned and sold on account of the claim of the Dry Dock Company, for the purpose of showing a constructive acceptance by the defendant, of the abandonment," was also properly excluded, both for the reasons stated in support of the ruling last discussed, and because the sale of the vessel by the admiralty court on the libel of the Dry Dock Company, has no tendency to prove acceptance of the abandonment, but rather its rejection. As already argued on the authority of

Bradlie vs. Maryland Ins. Co., 12 Peters, 378, 404, 409,

and in view of the conceded facts that the charterer and its agent, the master, ordered the repairs, and that work, not occasioned by the stranding, was put on the vessel, the sale of the steamer was attributable to the neglect of the owner to discharge the lien.

The insurer cannot be made to bear a loss within the policy by the wilful neglect of the owner to obtain her release from a lien which his representative, the charterer, has put upon the property. The case last cited denies the underwriter's liability where the equities of the insured were much stronger than here.

It is also submitted that no error can be assigned on the rejection of the evidence of the proceedings of the admiralty court, because of the failure to embody a copy of the record and proceedings in the record here.

Neither their contents or materiality can be otherwise known to this court. This is fatal.

Clement vs. Packer, 125 U. S., 309, 320.

4. Defendant's counsel also asked the witness, Wagner, (Rec. p. 55):

"Q. State if there was any look out forward?"

This was objected to as irrelevant, and an exception was taken to the ruling admitting the evidence.

"A. There was none."

The same fact was proved without objection on the cross-examination of plaintiff's witness, Harbottle, (Rec., p. 54,) and on the direct-examination of Malcomson. (Rec., p. 58.) It so clearly tended to show the negligence of the navigation, that the exception to the ruling seems frivolous.

5. The admission of the protest needs no defense. (Rec., p. 56.) It was served on the insurers as part of the proofs of loss, and was made in part the basis of plaintiff's claim against the insurer. (Rec., p. 34.) See also, Rec., p. 80, Exhibit "B," part III., where it is expressly mentioned as "heretofore served on you." It was intended for the action of the company which had a right to rely on its truth and, unless corrected for mistake, the insured was bound by it. If the proofs showed the loss, they were also evidence of the cause of loss, and that it

occurred in such a manner as to relieve the insurer of responsibility.

Insurance Co. vs. Newton, 22 Wall., 33, 35.

Plaintiff was estopped to deny their admissibility.

Atkins vs. Elwell, 45 N. Y., 753.

The fact that it was not attached to the proofs of loss is immaterial. It was referred to and described, so that it could be and was identified, (Rec., p. 56,) and thereby was made part of the instrument the same as if it were incorporated therein.

In Re Commissioners, Washington Park, 52 N. Y., 131.
Tonnele vs. Hall, 4 N. Y., 140.
Opinion of Judge Brown, (Rec., p. 23, 25.)

The plaintiffs adopted it as their own by serving it on the insurers.

Finally, it is submitted that the judgment should not be disturbed, even if technical error should be found in the record. The case of the plaintiff is clearly without merit, and the charge of the court as a whole was more favorable to plaintiff than the facts warranted. If any error was committed it was on the part of counsel for defendant in failing to ask the Court at the conclusion of the testimony to direct a verdict for defendant. No court would have hesitated to set aside a verdict for plaintiff upon the evidence. The annals of navigation present no case marked by more reckless navigation and utter disregard of the safety of life and property. There was but one issue —what was the cause of the disaster? To this inquiry the record affords but one answer even on plaintiff's

testimony alone. Isolated passages in the charge wrenched from their connection, and unqualified by the instruction of the Court elsewhere in the charge, are not *criteria* of the correctness of the charge, which invited conjecture in explanation of the loss

The plaintiff has had a fair trial. The evidence satisfied the jury—even against an insurance company—that running the Spartan at a high speed, with a defective compass, without a lookout or any other precaution, under iron clad orders that admitted of no discretion, were the sole cause of the loss. It is submitted that the evidence admitted no other conclusion, that the verdict was just, that justice has been done, and the judgment should be affirmed.

HENRY H. SWAN,

Of Counsel for Defendant in Error.

IN THE

Supreme Court of the United States,

OCTOBER TERM, 1889.

No. 296.

THE RICHELIEN AND ONTARIO NAVIGATION COMPANY,
Plaintiff in Error,

vs.

THE BOSTON MARINE INSURANCE COMPANY,
Defendant in Error.

ADDITIONAL POINT FOR PLAINTIFF IN ERROR.

JOSEPH H. CHOATE,
F. H. CANFIELD,
Of Counsel.

IN THE

Supreme Court of the United States.

THE RICHELIEU AND ONTARIO NAVIGATION COMPANY, *Plaintiff in Error,* *vs.* THE BOSTON MARINE INSURANCE COMPANY, *Defendant in Error.*	No. 296. October Term, 1889.

ADDITIONAL POINT FOR PLAINTIFF IN ERROR.

It is impossible to sustain the general verdict which the jury found upon the several alternative propositions of law contained in the charge, which were duly excepted to. Where several distinct grounds of liability on the part of the defendant are submitted to the consideration of the jury, if either was improperly submitted, and the verdict is a general one, the judgment will be reversed, unless it appear that some one of the others was so clearly established by uncontroverted evidence as to have rendered it the duty of the Court to direct a verdict for plaintiff, and this for the obvious reason that it is impossible to determine upon which of the several alternative grounds which were left to them, the jury based the general verdict.

Baldwin v. *Burrows*, 47 N. Y., 199.

Maryland v. *Baldwin*, 112 U. S., 490, at p. 493.

The following distinct grounds of liability on the part of the defendant were submitted to the consideration of the jury:

First.—If they found that there were any defects in the compass, known or *unknown*, rendering it unsafe for use on Lake Superior, and the stranding was caused by such defects (page 74).

Second.—If they found that the stranding occurred by the vessel's being navigated with excessive speed (page 73).

Third.—If they found that the loss was occasioned by the want of a lookout (page 73).

Fourth.—If it resulted from the incompetency of the master.

Fifth.—If it resulted from insufficiency of the crew.

Sixth.—Or if it resulted from want of ordinary care and skill in navigating the vessel.

It is not and cannot be claimed that either of these alternative propositions was so clearly established by uncontroverted evidence as to have rendered it the duty of the Court to direct a verdict for the plaintiff.

It is obvious that the jury found that *one or another* of these several propositions was established by the evidence, but it is impossible to tell which. The verdict being *general*, does not establish any or either of the propositions. They may have found that the stranding was caused by a defective compass, and that none of the other alleged faults existed. On the other hand, they may have found that there was no defect in the compass, that the speed was not excessive, that there was no want of ordinary care or skill in navigating the vessel, that there was no incompetency of the master, no want of a lookout, but that the stranding resulted, in some way or other, from insufficiency of the crew; and so in respect to each of the other five alternative propositions.

A.

In respect to the alleged defect in the compass, if submitted alone and by itself, there would have been a fair question of fact for the jury to determine. The proposition of the learned Judge was, that an *unknown* defect causing the stranding would defeat a recovery wherein, as appears by his opinion on the motion for a new trial (page 31), he construed the exception to amount to a warranty of seaworthiness, and so that the ignorance of the owner of the defect in the compass would not improve his right to recover.

The exact thing thus submitted to the jury to find was, that a defect existing at the time of the loss and not before, and so unknown, and not possible to be known to the owners, would be fatal to a recovery for the plaintiff. The submission of this question in this form, had it been submitted distinctly and independently of all others, would have been error in law according to the latest authorities. There is no implied warranty against unseaworthiness in a time policy, except at the commencement of the risk, and where loss, arising from unseaworthiness, is the subject of a special exception from the perils insured against, as in this policy, it is altogether too severe a rule to forfeit a recovery by reason of a defect developed for the first time by the circumstances attending the loss, and which was not and could not have been known and provided against by the insured. The most that can be made of it, certainly, is to construe the rule as requiring such standard of unseaworthiness as the law, under a time policy, requires at the hands of owners. At any rate, this is what the Court of Appeals of New York has recently held, under a time policy which, in this respect, was exactly like the policy in suit.

Berwind v. *The Greenwich Ins. Co.*, 114 N. Y., 231.

The policy in that case excepted from the perils insured

against those arising "from rottenness, inherent defects, and other unseaworthiness," 53 N. Y. Superior Ct., (2, J. & S.), 103, and the Court of Appeals held (114 N. Y., 231) that, under such a policy, it was at least incumbent upon the owners to show that the boat was seaworthy when she left *upon her last trip*, because—

> "In time policies there is implied a warranty that the vessel will be in repair and made seaworthy at all times during the continuance of the risk, *so far as that is reasonably possible*, and this implied covenant imposes upon the insured the duty of *active diligence* to keep the vessel in good order and in seaworthy condition."

Under this rule, it is clear that, for a defect not known, the defendant could not bring the case within the excepted risk, and, assuming it to have been a fair question upon the evidence, as to the cause of the defect, it cannot be gathered from the verdict that the jury found that such defect was, or could have been, known to the owners at the time of the loss. They may have found that it was an unknown defect, and yet were constrained by the charge to find for the defendant. On the other hand, they may have found that there was a known defect, and that, therefore, under the charge, there was a loss caused by, or contributed to, by want of ordinary care and skill in navigating the vessel, with such a compass, at such a speed, in such a fog. Of course, if the defect was unknown, there was no evidence to sustain the charge of a want of ordinary care and skill in navigating the vessel, the only suggestion of such want of care or skill upon the record being the alleged defect in the compass. Thus, upon these two alternative propositions alone, if the case had been submitted to the jury, without more, it would have been impossible to tell whether they found the defect to have been unknown, and so discharged the defendant as for a breach of warranty, which we think would have been error, or known, and so involving a want of care and skill in navigating and bringing the case within the excepted perils.

B.

In respect to the excessive speed of the vessel, the case was erroneously given to the jury, in any aspect of it, because they were required to find for the defendant, if they found the loss was occasioned by the excessive speed of the vessel, independently of and without any regard to the condition of the compass. That is to say, under the charge, as made and excepted to, the jury may have found that the compass had no defect, and yet that the stranding was caused by excessive speed, which was clear error. It has never been held that running at twelve miles an hour in a fog, on the open sea or lake, where no collision took place or was to be anticipated, was negligence, or a departure from ordinary care and skill. On the contrary, we believe it may be safely submitted, as a proposition either of law or fact, that it is not bad seamanship to run a steamer at twelve miles an hour on the open sea, even in a fog. The *City of Paris*, and the other new steamers, run at twenty miles and more, fog or no fog, in the hands of the most accomplished and experienced navigators. The statute of Canada, as we have already shown, has nothing to do with the matter, and it is impossible to impute the stranding, which took place in a dense fog, in the night-time, where it was impossible to see anything, to such speed. What is proper or improper speed depends upon the circumstances. If there was no defect in the compass, as the jury may have found, and if the captain believed the ship, as in that case he had a right to do, to be about seventeen miles off shore, there was no reason in sense, or in the rules or customs of navigation, why he should slacken his speed, even in a fog. If the jury found that there were defects in the compass, known to the master, which made it a want of ordinary care and skill to sail the ship under its guidance at such a speed in such a fog—if that proposition had been submitted to the jury by itself, the verdict might have been sustained, but inasmuch as, under the first proposition referred to, the jury may have found that the defect was

not known, this conjecture of a known defect cannot sustain a general verdict.

C.

In respect to the alleged incompetency of the master, upon which, if the jury found that the stranding resulted therefrom, they were instructed that they might base a verdict for the defendant, there was no evidence and no pretence of the existence of any such fact in the whole case. Incompetency of the master, in this exception in the policy, would be unseaworthiness and lack of qualifications for the performance of the duties of master, but negligence in the particular case would not constitute such incompetency. The evidence shows him to have been an entirely competent and experienced shipmaster; he has sailed upwards of forty years, and had been a pilot on Lake Superior from 1857 and was perfectly familiar with the route (Record, pp. 34, 38). Being of competent nautical skill, and there being no imputations upon his character, or fitness, in any respect, it certainly was not incompetence within the meaning of the policy if the master was negligent in navigating the vessel in a fog with a defective compass, or at too great a rate of speed. At the worst, it was but error of judgment, and yet the jury may have found under the charge that, although there was no defect in the compass and no unsafe speed, yet, from some reason or other, for which there was no foundation in the evidence, the stranding resulted from incompetence on the part of the master, which, clearly, was wholly unwarranted.

D.

As to insufficiency of the crew, the same observations apply. Insufficiency of the crew also is unseaworthiness, but there was no suggestion of any such insufficiency here on the trial. The ship appears to have had a full complement. The master testifies that be-

sides himself she had two mates, two wheelsmen, two engineers, four firemen, and full complement in the cabin, and four or five deck hands (page 35). This for a steamboat of her tonnage and business was ample. At any rate, there is not the least evidence or intimation that it was not, and yet the jury may have found, under the charge, that there was no defect in the compass, no excessive speed, no incompetency in the master, and yet that the loss resulted from some imaginary insufficiency of the crew.

E.

In respect to the want of a lookout, it is true that she had no man posted forward to perform the specific duty of a lookout, but no witness attributed the stranding to this, or suggested that this contributed to it in any way. Indeed, it is difficult to say how it could, as by the testimony of the first mate, who was in command and on deck at the time of the disaster (p. 55), there was such a dense thick fog that you could not see anything. After he took charge there was no one else on deck but himself and the wheelsman, and they were sufficient. But whether such a proposition charged distinctly and independently of all other considerations, would have sustained a verdict, and would have brought the case within the excepted perils and sustained a verdict, is not material, because it is impossible to say that the jury found any such cause of the stranding.

Forasmuch, therefore, as this general verdict rests upon these six alternative propositions, and some of them certainly were improperly submitted, and it is impossible to say that the verdict was not found upon these so improperly submitted, the judgment must be reversed, and a new trial ordered.

JOSEPH H. CHOATE,
F. H. CANFIELD,
Counsel for Plaintiff in Error.

136-436
136 13 orig

In the Supreme Court of the U. S.

136-436

THE PEOPLE OF THE STATE OF NEW YORK, upon the relation of WILLIAM KEMMLER,
Plaintiff in Error,

against

CHARLES F. DURSTON, Agent and Warden of Auburn Prison,
Defendant in Error.

Motion for a Writ of Error.

And now comes the said William Kemmler, by Roger M. Sherman, his attorney, and, by leave of the Court, moves the Court now here, for a Writ of Error out of said Court, in due form of law, to the Court of Appeals of the State of New York, or the Supreme Court of said State, in the Fifth Department, or either of said Courts, and for a citation thereupon, to the said Charles F. Durston, and the Governor and Attorney General of the State of New York, and thereupon he complains and says that in the record and proceedings, and also in the rendition of a judgment in a suit between the People of the State of New York upon the relation of William Kemmler against Charles F. Durston, Agent and Warden of Auburn Prison, in the Supreme Court of New York, in the Fifth Judicial Department, wherein remains the said record, upon a remittitur from the Court of Appeals, being the

highest court of law or equity of the said State in which a decision could be had in said suit, and in which a final judgment or decree was rendered against him, on the day of March, 1890, in said suit, wherein said William Kemmler prosecuted by petition to be relieved by a writ of habeas corpus from a sentence of death pronounced against him, in the Court of Oyer and Terminer for Erie County in said State, pursuant to chapter 489 of the laws of said State of 1888, and wherein by his said petition he alleged and charged that said statute was contrary to the Constitution of the United States, in that said statute and the proceedings thereupon imposed a cruel and unusual punishment for crime, and deprived him of his liberty and life without due process of law; all of which appears in the record and proceedings in said suit; manifest error has happened to the great damage of said William Kemmler, a citizen of the United States.

Therefore he prays for the allowance of a writ of error and such other process as may cause the same to be corrected as aforesaid by the Supreme Court of the United States.

ROGER M. SHERMAN,
Attorney and of Counsel for
said WILLIAM KEMMLER,
140 Nassau St., New York, N. Y.

Washington, May 19th, 1890.

STATE OF NEW YORK,
Cayuga County, Clerk's Office. } ss.:

I, BENJAMIN M. WILCOX, Clerk of the County of Cayuga, and of the Supreme Court of said State, and of the County Court of said County, each being a Court of Record and having a common Seal, do hereby certify that I have compared the annexed and foregoing copy of petition, writ of habeas corpus, return to writ with Exhibit "B" attached, order of County Judge, order of General Term and judgment thereunder, remittitur of Court of

Appeals, and order of Supreme Court and judg- 7
ment thereunder with the originals thereof, now remaining on file in my office, and that the same is a correct copy of such originals, and of the whole thereof.

In testimony whereof, I have hereunder set my hand and affixed the Seal of
[SEAL] said County and of said Courts at Auburn, N. Y., this 12th day of May, 1890.

B. M. WILCOX,
Clerk.

To Honorable CHARLES C. DWIGHT:

The petition of Charles S. Hatch respectfully 8
shows that William Kemmler, otherwise called John Hort, is imprisoned or restrained in his liberty at Auburn State Prison, in the City of Auburn, County of Cayuga, State of New York, by Charles F. Durston, agent and warden of Auburn State Prison, having charge thereof. That he has not been committed and is not detained by virtue of any judgment, decree, final order, or process issued by a court or judge of the United States, in a case where such courts or judges have exclusive jurisdiction under the laws of the United States, or have acquired exclusive jurisdiction by the commencement of legal proceedings in such a court; nor is he committed or detained by virtue of the final judg- 9
ment or decree of a competent tribunal of civil or criminal jurisdiction, or the final order of such a tribunal made in the special proceedings instituted for any cause except to punish him for a contempt; or by virtue of an execution or other process issued upon such a judgment, decree or final order that the cause or pretense of the imprisonment or restraint of said William Kemmler, otherwise called John Hort, according to the best knowledge and belief of your petitioner, is that he was indicted by the Grand Jury of Erie County, for murder in the first degree; that he was tried therefor at a Court

of Oyer and Terminer of Erie County, and found guilty thereof by the verdict of a jury on the 10th day of May, 1889; that thereafter and on the 14th day of May, 1889, he was arraigned in said Court of Oyer and Terminer for sentence; that, contrary to the Constitution of the State of New York and of the United States, and contrary to his objection and exception, duly and timely taken in due form of law, he was sentenced to undergo a cruel and unusual punishment, as appears by a copy of the pretended judgment, warrant or mandate hereto annexed and made a part of this petition and marked Exhibit "A," by virtue of which such imprisonment or restraint is claimed to be; that he is deprived of liberty and threatened with deprivation of life without due process of law, contrary to the Constitution of the State of New York and of the United States, and contrary to his objection and exception thereto, duly and timely taken. The imprisonment is stated to be illegal because it is contrary to the provisions each of said Constitutions.

Wherefore your petitioner prays that a habeas corpus issue, directed to said Charles F. Durston, such agent and warden as aforesaid, commanding him that he have the body of the said William Kemmler, otherwise called John Hort, by him in prison and detained, together with the cause of such imprisonment and detention, before Hon. S. Edwin Day, County Judge of Cayuga County, on the 18th day of June, 1889, at the Court House of the City of Auburn, in said county, at 10 o'clock of that day.

Dated the 11th day of June, 1889.

C. S. HATCH,
Petitioner.

STATE OF NEW YORK, }
County of Erie, } ss.:

CHARLES S. HATCH, being duly sworn, says that he is attorney for the defendant, and is authorized by said defendant to make this petition; that he

has heard the foregoing petition read and knows the contents thereof and that he believes it to be true. 13

CHARLES S. HATCH.

Subscribed and sworn to before me, the 10th day of June, 1889.

DANIEL C. OATMAN,
Notary Public in and for Erie County.

THE PEOPLE OF THE STATE OF NEW YORK

to

CHARLES F. DURSTAN, Agent and Warden of Auburn State Prison. 14

We command you that you have the body of William Kemmler, otherwise called John Hort, by you imprisoned and detained, as it is said, together with the time and cause of such imprisonment and detention by whatsoever name the said William Kemmler, otherwise called John Hort, is called or charged, before the Hon. S. Edwin Day, County Judge of Cayuga County, at the Court House, in the City of Auburn, on the 18th day of June, 1889, at ten o'clock, to do and receive what shall then and there be considered, concerning the said William 15 Kemmler, otherwise called John Hort, and have you then and there this writ:

Witness: Hon. Charles C. Dwight, one of the judges of the Supreme Court, on the 19th day of June, one thousand eight hundred and eighty-nine.

C. A. ORR, Clerk.

CHARLES S. HATCH,
Attorney for Defendant.

(Endorsed): I allow the within writ this 11th day of June, 1889.

CHARLES C. DWIGHT,
Justice Supreme Court, S. N. Y.

16 COUNTY COURT,

CAYUGA COUNTY.

In the Matter

of

The Petition of CHARLES S. HATCH for a writ of habeas corpus to bring the body of WILLIAM KEMMLER, otherwise called JOHN HORT, before the Hon. S. EDWIN DAY, County Judge of Cayuga County.

17

I, CHARLES F. DURSTON, Agent and Warden of Auburn State Prison, to the writ of habeas corpus issued by the Honorable Charles C. Dwight, a Justice of the Supreme Court of the State of New York, on the 11th day of June, 1889, on the petition of Charles S. Hatch, do make the following return :

First.—That I am the duly appointed and acting Warden and Agent of the Auburn State Prison, and on the said 11th day of June, 1889, and before the said writ of habeas corpus was served upon and came to me, the said William Kemmler, otherwise
18 called John Hort, was and now is in my custody and detained by me in the State Prison at Auburn, in the State of New York, under and by virtue of a judgment of the Court of Oyer and Terminer of the State of New York, held in and for the County of Erie, on the 14th day of May, 1889, duly convicting the said William Kemmler, otherwise called John Hort, of murder in the first degree. A true copy of the judgment roll of the aforesaid conviction is hereto attached as a part hereof and marked Exhibit "A."

And said William Kemmler, otherwise called John Hort, is also detained in my custody as

such Warden and Agent under and by virtue of 19
a warrant signed by the Hon. Henry A. Childs, the Justice of the Supreme Court before whom the said William Kemmler, otherwise called John Hort, was, as aforesaid, duly tried and convicted, and which said warrant was duly issued in pursuance of the aforesaid conviction and in compliance with the provisions of the Code of Criminal Procedure, relating thereto, a copy of which said warrant is hereto annexed as a part hereof and marked Exhibit "B."

Second.—And I, the said Charles F. Durston, Agent and Warden of Auburn State Prison, do make a further return and allege as I am advised and verily believe to be true, that the said William 20
Kemmler, otherwise called John Hort, was not sentenced as hereinbefore set forth, to undergo a cruel and unusual punishment, contrary to the provisions of the Constitution of the State of New York and the Constitution of the United States.

And I do further allege that the said imprisonment and restraint of the said William Kemmler, otherwise called John Hort, and the deprivation of his liberty and the threatened deprivation of life, are not without due process of law and are not contrary to the provisions of the Constitution of the State of New York or the Constitution of the United States, as alleged in the petition upon which said writ of habeas corpus was granted. 21

I do further allege as I am advised, that the said judgment of conviction hereinbefore set forth, and the aforesaid warrant and the punishment and deprivation of liberty and the threatened deprivation of life of the said William Kemmler, otherwise called John Hort, thereunder, are fully warranted by the provisions of Chapter 489 of the Laws of 1888, which is a valid enactment of the Legislature of the State of New York, and is it not in conflict with or in violation of the provisions of the Constitution of the State of New York or the Constitution of the United States.

22 And I hold the said William Kemmler, otherwise called John Hort, under and by virtue of no other authority than as hereinbefore set forth.

Wherefore, I pray that the aforesaid writ of habeas corpus be dismissed and the said William Kemmler, otherwise called John Hort, be remanded into my custody, and that the said judgment of the said Court of Oyer and Terminer and the warrant issued in pursuance thereof, may be duly executed according to their terms and conditions.

Dated, this 25th day of June, 1889.

CHAS. F. DURSTON,
Agent and Warden.

23 CITY OF AUBURN, }
Cyauga County. } ss.:

CHARLES F. DURSTON, being duly sworn, says, that he is the same person described in and who subscribed the foregoing return to the writ of habeas corpus herein; that he has read the foregoing return and knows the contents thereof, and that the same is true of his own knowledge except as to the matters therein alleged to be stated on information and belief, and that as to those matters he believes it to be true.

CHAS. F. DURSTON.

Subscribed and sworn to before me, }
this 25th day of June, 1889. }

24

JOHN F. AGNE,
Notary Public.

Exhibit "B."

STATE OF NEW YORK, }
County of Erie. }

THE PEOPLE OF THE STATE OF NEW YORK,

to

THE AGENT AND WARDEN OF THE AUBURN STATE PRISON, greeting.

Whereas, at a Court of Oyer and Terminer, held at the City and County Hall, in the City of Buffalo, County of Erie and State of New York, on the 10th day of May, in the year of our Lord one thousand eight hundred and eighty-nine, and before the Hon. Henry A. Childs, one of the justices of the Supreme Court of the State of New York, presiding, and a jury, William Kemmler, otherwise called John Hort, was convicted of the crime of murder in the first degree, in that he willfully, feloniously and with malice aforethought, and from a deliberate and premeditated design to effect the death of Matilda Ziegler, otherwise called Matilda Hort, did kill and murder the said Matilda Ziegler, otherwise called Matilda Hort, on the 29th day of March, in the year of our Lord one thousand eight hundred and eighty-nine, at the City of Buffalo, County of Erie, aforesaid, by then and there striking, beating, cutting and wounding her, the said Matilda Ziegler, otherwise called Matilda Hort, in and upon her head with a certain hatchet, axe and sharp instrument, then and there inflicting upon the head of the said Matilda Ziegler, otherwise called Matilda Hort, several mortal wounds, of which said mortal wounds she, the said Matilda Ziegler, otherwise called Matilda Hort, did on the 30th day of March, in the year of our Lord one thousand eight hunhred and eighty-nine, die.

And thereafter, at said term of the Court of Oyer and Terminer, holden at the City and County Hall,

in the City of Buffalo, in the County and State aforesaid, on the 14th day of May, in the in the year of our Lord one thousand eight hundred and eighty-nine, the said William Kemmler, otherwise called John Hort, was duly brought before the Court for sentence, and after due inquiry being made into the circumstances, and there appearing no legal reason why the execution of sentence against the said William Kemmler, otherwise called John Hort, should not be made, the said Court of Oyer and Terminer, holden as aforesaid, did thereupon sentence the said William Kemmler, otherwise called John Hort, to suffer the punishment of death, to be inflicted by the application of electricity, as provided by the Code of Criminal Procedure of the State of New York, within the week commencing on Monday, the 24th day of June, in the year of our Lord one thousand eight hundred and eighty-nine, within the walls of Auburn State Prison, or in the yard or enclosure thereto adjoining, and that in the meantime he, the said William Kemmler, otherwise called John Hort, be removed to and until the infliction of said punishment be kept in solitary confinement in said Auburn State Prison.

Now, therefore, you are hereby ordered, commanded and required to execute the said sentence upon him, the said William Kemmler, otherwise called John Hort, upon some day within the week commencing on Monday, the 24th day of June, in the year of our Lord one thousand eight hundred and eighty-nine, and within the walls of Auburn State Prison, or within the yard or enclosure adjoining thereto, by then and there causing to pass through the body of him, the said William Kemmler, otherwise called John Hort, a current of electricity of sufficient intensity to cause death, and that the application of such current of electricity be continued until he, the said William Kemmler, otherwise called John Hort, be dead.

Given under my hand and the seal of this Court, this 16th day of May, in the year of our Lord one thousand eight hundred and eighty-nine.

[SEAL]

HENRY A. CHILDS,
Justice, Supreme Court.

BEFORE THE COUNTY JUDGE OF CAYUGA COUNTY. 31

IN THE MATTER

of

The Proceedings upon a Writ of Habeas Corpus to inquire into the cause of detention of WILLIAM KEMMLER.

THE PEOPLE, etc., *ex rel.* WILLIAM KEMMLER 32

v.

CHARLES F. DURSTON, Agent and Warden of Auburn Prison.

A writ of habeas corpus having heretofore been granted herein by the Honorable Charles C. Dwight, a justice of the Supreme Court, directed to Charles F. Durston, Agent and Warden of Auburn State Prison, requiring him to have the body of said William Kemmler, together with the time and cause of the imprisonment of said Kemmler, before me at the Court House in the City of Auburn, Cayuga 33 County, N. Y., on the 18th day of June, 1889; and the hearing of the same having been adjourned from time to time to the 25th day of June, 1889, and on the day last mentioned and at the said Court House in the City of Auburn, the said Charles F. Durston, such Agent and Warden, having produced said Kemmler before me and made return to such writ, and such return having been controverted by the said William Kemmler, upon the ground, as alleged, that the sentence and judgment of the Oyer and Terminer of Erie County, set forth in the return to said writ, as the cause of such imprisonment were unconstitutional and void.

34 And an order thereupon having been made by me, to wit, on the said 25th day of June, 1889, appointing Tracy C. Becker, esquire, of the city of Buffalo, attorney at law, a referee to take the testimony produced in support of or against the imprisonment or detention of the said William Kemmler, and to report the same to me with all convenient speed, and the said referee having thereupon been attended by counsel for the prisoner and by counsel for the said agent and warden and for the people of the State of New York, and having taken such testimony and evidence and made return to me of the same, to wit, on the 11th day of September, 1889.

35 After reading and filing the petition herein, said writ and the return of the said Durston thereto, and the evidence and testimony so returned and reported to me by the said referee, it appearing therefrom that the said William Kemmler is duly and lawfully detained in the custody of the said agent and warden of the Auburn State Prison, by virtue of the final judgment of a competent tribunal of criminal jurisdiction, to wit, a court of Oyer and Terminer held in and for the County of Erie, as set forth in the return to said writ, and that the term of his imprisonment has not expired.

It is, on motion of the Attorney General, of counsel for the people and said agent and warden,
36 ordered, that the said William Kemmler be, and he hereby is, remanded to the custody of the said agent and warden of the State Prison at Auburn.

S. EDWIN DAY,
Cayuga County Judge.

Dated October the 12th, 1889.

At a General Term of the Supreme Court 37
of the State of New York, in and
for the Fifth Judicial Department,
held at the Court House in the
City of Rochester, Monroe County,
on the 1st day of October, 1889.

Present:
Hon. GEORGE BARKE, Presiding Justice.
Hon. CHARLES C. DWIGHT, } Asso. Justices.
Hon. FRANCIS A. MACOMBER, }

THE PEOPLE *ex rel* WILLIAM KEMMLER, 38
Appellant.

v.

CHARLES F. DURSTON, Agent and Warden,
Respondent.

An appeal having been taken from the order heretofore made by Hon. S. Edwin Day, County Judge of Cayuga County, remanding the relator, William Kemmler, to the custody of Charles F. Durston, Agent and Warden of Auburn Prison, having been brought on for argument at a General 39
Term of this Court, held in and for the Fifth Judicial Department of the State of New York, and after hearing Hon. W. Bourke Cochran, of counsel for the said relator, and Hon. Charles F. Tabor, Attorney General, of counsel for the People of the State of New York, and Charles F. Durston as agent and warden, and due deliberation being had thereon,

It is ordered, That the order made herein be, and the same is hereby in all things affirmed.

40 SUPREME COURT.

In the Matter

of

The Proceedings upon a Writ of Habeas Corpus to inquire into the detention of William Kemmler.

The People of the State of New York, *ex rel.* William Kemmler.
Appellant,

41 *v.*

Charles F. Durston, Agent and Warden of Auburn Prison.
Respondent.

A writ of habeas corpus having heretofore been granted herein by Hon. Charles C. Dwight, a Justice of the Supreme Court, and directed to Charles F. Durston, agent and warden of Auburn State Prison, requiring him to have the body of William Kemmler, together with the time and cause of imprisonment of said Kemmler, before Hon. S.
42 Edwin Day, County Judge of Cayuga County, at the Court House in the City of Auburn, Cayuga County, N. Y., and the said Charles F. Durston, as such agent and warden, having produced said Kemmler before the Hon. S. Edwin Day, County Judge of Cayuga County, in pursuance of the provisions of said writ, and having made return to such writ, and such return having been controverted by said William Kemmler, and an order thereupon having been made appointing Tracy C. Becker, of the City of Buffalo, attorney and counsellor at law, as referee to take the testimony produced in support of or against the remanding or detention of the said William Kemmler; and the said Referee having

thereupon been attended by counsel for the prisoner and by counsel for the said agent and warden and for the People of the State of New York, and having taken such testimony and evidence and made return to the said Hon. S. Edwin Day, County Judge of Cayuga County; and the said Hon. S. Edwin Day, County Judge of Cayuga County, upon the return of such testimony and evidence, and upon the petition, writ of habeas corpus and the return of the said Durston thereto, having made an order that the said William Kemmler was duly and lawfully detained in the custody of the said Durston, as agent and warden of the said Auburn State Prison, by reason of the final judgment of a competent tribunal of criminal jurisdiction, to wit: a Court of Oyer and Terminer held in and for the County of Erie, as set forth in said writ, and that the term of his imprisonment had not expired, and having ordered that the said William Kemmler be remanded to the custody of the said agent and warden of the State Prison at Auburn, which order was entered in the Office of the Clerk of the County of Cayuga, on the 14th day of October, 1889; and an appeal having been taken by the said William Kemmler, relator, to the General Term of the Supreme Court, Fifth Department, from the order so made and entered as aforesaid, remanding the relator, William Kemmler, to the custody of the said Charles F. Durston, agent and warden of the State Prison at Auburn, and said appeal having come on to be heard at a General Term of the Supreme Court of the State of New York, held in and for the Fifth Judicial Department, at the Court House in the City of Rochester, Monroe County, on the first day of October, 1889, and an order having been made by the said General Term affirming in all things the order so made from which said appeal was taken, as hereinbefore referred to.

It is, on motion of Charles F. Tabor, Attorney General of counsel for the People of the State of New York, and for the said Charles F. Durston, as agent and warden of the State Prison at Auburn,

46 Ordered, adjudged, decreed and determined, that said order heretofore made in this proceeding by the Hon. S. Edwin Day, County Judge of the county of Cayuga, remanding the said William Kemmler to the custody of the said Charles F. Durston, as agent and warden of the Auburn State Prison, be, and the same is hereby in all things affirmed.

COURT OF APPEALS.

State of New York, ss. :

47 Pleas in the Court of Appeals, held at the Capitol, in the City of Albany, on the 21st day of March, in the year of our Lord one thousand eight hundred and ninety, before the Judges of said Court.

Witness—The Hon. WILLIAM C. RUGER, Chief Judge, presiding.

GORHAM PARKS,
Clerk.

Remittitur, March 22, 1890.

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48 THE PEOPLE OF THE STATE OF NEW YORK *ex rel.* WILLIAM KEMMLER,
Appellant,

against

CHARLES F. DURSTON, Agent and Warden of Auburn State Prison,
Respondent.

Be it remembered that on the 29th day of January, in the year of our Lord one thousand eight

hundred and ninety, William Kemmler, the ap- 49
pellant in this action, came here into the Court of Appeals by Charles S. Hatch, Esq., his attorney, and filed in the said Court a notice of appeal and return thereto from the judgment of the General Term of the Supreme Court of the State of New York.

And Charles F. Durston, agent and warden of Auburn Prison, the respondent in said action, afterwards appeared in said Court of Appeals by Hon. Charles F. Tabor, Attorney-General, his attorney; which said notice of appeal and the return thereto filed as aforesaid are hereunto annexed.

Whereupon, the said Court of Appeals, having heard this cause argued by Mr. W. Bourke Coch- 50
ran, of counsel for the appellant, and Mr. Charles F. Tabor, Attorney General, of counsel for the respondent, and after due deliberation had thereon, did order and adjudge that the judgment of the General Term of the Supreme Court appealed from to this Court be, and the same is hereby in all things affirmed.

And it was also further ordered that the record aforesaid and the proceedings in this Court be remitted to the said Supreme Court, there to be proceeded upon according to law.

Wherefore, it is considered that the said judgment be in all things affirmed, as aforesaid.

And hereupon, as well as the Notice of Appeal 51
and return thereto aforesaid, as the judgment of the Court of Appeals as aforesaid, by them given in the premises, are by the said Court of Appeals remitted unto the Supreme Court of the State of New York, before the justices thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said Supreme Court before the justices thereof, etc.

GORHAM PARKS,
Clerk of the Court of Appeals of the State of New York.

52 COURT OF APPEALS, CLERK'S OFFICE,
Albany, March 22d, 1890.

I hereby certify that the preceding record contains a correct transcript of the proceedings in said action in the Court of Appeals, with the papers originally filed therein, attached thereto.

GORHAM PARKS,
Clerk, (L. S.)

At a Special Term of the Supreme Court of the State of New York, held at the Court House in the City of Auburn, on the 14th day of April,
53 1890.

Present: HON. CHARLES C. DWIGHT, Justice.

SUPREME COURT.

IN THE MATTER

of

The Proceedings upon a writ of Habeas Corpus to inquire into the detention of WILLIAM KEMMLER.

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54 The People of the State of New York *ex rel.* WILLIAM KEMMLER,
Appellant.

vs.

CHARLES F. DURSTON, Agent and Warden of Auburn Prison,
Respondent.

On reading and filing the remittitur from the Court of Appeals herein, made on the 21st day of

March, 1890, wherein it was ordered and adjudged 55
that the order of the General Term of the Supreme Court appealed from to that Court be, and the same was in all things affirmed.

On motion of Charles F. Tabor, Attorney General of the State of New York, attorney for the respondent,

It is hereby ordered that the order and judgment of the Court of Appeals be, and the same hereby is made the order and judgment of this Court.

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58 SUPREME COURT.

IN THE MATTER

of

The Proceedings upon a Writ of Habeas Corpus to inquire into the detention of WILLIAM KEMMLER.

THE PEOPLE OF THE STATE OF NEW YORK *ex rel.* WILLIAM KEMMLER,
59 Applts.,

v.

CHARLES F. DURSTON, Agent and Warden of Auburn Prison, Respondent.

A writ of habeas corpus having heretofore been granted herein by Hon. Charles C. Dwight, a Justice of the Supreme Court, directed to Charles F. Durston, Agent and Warden of Auburn State Prison, re-
60 quiring him to have the body of William Kemmler, together with the time and cause of imprisonment of said Kemmler before Hon. S. Edwin Day, County Judge of Cayuga County, at the Court House in the City of Auburn, Cayuga County, N. Y., and the said Charles F. Durston, as such agent and warden, having produced said Kemmler before the Hon. S. Edwin Day, County Judge of Cayuga County, in pursuance of the provisions of said writ, and having made return to such writ, such return having been controverted by said William Kemmler, and an order having thereupon been made, appointing Tracy C. Becker, of the City of Buffalo, attorney and counsellor at law, as referee, to take the

testimony produced in support of or against the re- 61
manding or detention of said Kemmler; and the said referee having thereupon been attended by counsel for the prisoner and by counsel for the said agent and warden and for the State of New York, and having taken such testimony and evidence and made return to the said Hon. S. Edwin Day, County Judge of Cayuga County, and the said Hon. S. Edwin Day, County Judge of Cayuga County, upon the return of such testimony and evidence, upon the petition, writ of habeas corpus, and the return of said Durston thereto, having made an order that the said William Kemmler was duly and lawfully retained in the custody of said Durston, as agent and warden of said Auburn State Prison, by reason of 62
the final judgment of a competent tribunal of criminal jurisdiction, to wit: a Court of Oyer and Terminer held in and for the County of Erie, as set forth in said report, and that the term of his imprisonment had not expired, and having ordered that the said William Kemmler be remanded to the custody of the said agent and warden of the State Prison at Auburn, which order was entered in the office of the Clerk of the County of Cayuga on the 14th day of October, 1889, and an appeal having been taken by said William Kemmler, relator, to the General Term of the Supreme Court of the Fifth Department, from the order so made and entered as aforesaid, remanding said William Kemmler to 63
the custody of said Charles F. Durston, agent and warden of the State Prison at Auburn, and said appeal having come on to be heard at a General Term of the Supreme Court of the State of New York, held in and for the Fifth Department, at the Court House in the City of Rochester, Monroe County, on the first day of October, 1889, and an order having been made by said General Term, affirming in all things the order so made, from which said appeal was taken as hereinbefore referred to, which order was entered in the office of the Clerk of the County of Cayuga on the

64 2d day of January, 1890; and an appeal having been taken by the said William Kemmler to the Court of Appeals of the State of New York from the order and judgment of the General Term of the Supreme Court, so made as aforesaid, and said appeal having come on to be heard by the Court of Appeals, and an order having been made by the said Court of Appeals affirming in all things the order so made by the General Term of the Supreme Court, as aforesaid, and remitting the proceedings to this Court, and an order having been made herein making the judgment and order of the Court of Appeals the judgment and order of this Court.

Now, on motion of Charles F. Tabor, Attorney
65 General of the State of New York, of counsel for the People of the State of New York and for the said Charles F. Durston, agent and warden of the State Prison at Auburn;

It is ordered, adjudged, decreed and determined that the order heretofore made in this proceeding by the General Term of the Supreme Court of the Fifth Department of the State of New York, affirming in all things the order made in this proceeding heretofore by Hon. S. Edwin Day, County Judge of Cayuga County, remanding the said William Kemmler to the custody of the said Charles F. Durston, as agent and warden of the Auburn State Prison, as aforesaid, be, and the same is hereby in
66 all things affirmed.

Supreme Court of the United States.

Ex parte KEMMLER.

This is a motion for an original writ of habeas corpus.

The petitioner is under sentence of death in the Northern District of New York, under a statute of New York, which imposes the punishment of death by the passing through his body of a current of electricity sufficient, in the opinion of the Warden of the State prison, to cause his death, which current is to be continued until it kills him; the statute also leaves it to the Warden to fix the day and hour of his death, and contains other features which he here asserts are in violation of the 14th Amendment. These features abridge his privileges and immunities as a citizen of the United States and deprive him of his life without due process of law.

Judge Wallace has granted a writ, in the emergency, to afford an opportunity to make this application. The case having been passed upon under the State Constitution by the Court of Appeals, it is suggested that an original writ here is proper.

The petition, an affidavit showing the emergency, the opinion of the Court of Appeals of New York, and the State Statute are herewith submitted.

ROGER M. SHERMAN,
Of Counsel for Petitioners.

May 5, 1890.

4 *To the Justices of the Supreme Court of the United States.*

The petition of William Kemmler respectfully shows:

I. That he is a citizen of the United States, and is deprived of his liberty by Charles F. Durston, Agent and Warden of Auburn Prison, at Auburn, in the said Northern District of New York, who threatens and is about to put him, the said Kemmler, to death by causing to pass through the body of him, the said Kemmler, a current of electricity of sufficient intensity, in the opinion of said Durston, to cause death; and that he, the said Kemmler, is thus held
5 in custody and deprived of his liberty, against his will, and in violation of the Constitution of the United States.

II. The facts concerning the detention of said Kemmler and the claim or authority by virtue of which he is so detained are as follows:

He was convicted in the Court of Oyer and Terminer of the County of Erie, in the State of New York, of the crime of murder in the first degree, committed March 29, 1888; and a warrant has been issued upon the judgment of said conviction to said Durston, appointing the week within which sentence must be executed, commanding said Durston
6 to do execution upon some day within said week, by causing to pass through the body of him, the said William Kemmler, a current of electricity of sufficient intensity to cause death, and that the application of such current of electricity be continued until he, the said William Kemmler, be dead. Said week expires on the 3d day of May, 1890.

III. The only authority of law for said sentence upon said conviction is a statute of the State of New York, Chapter 489 of the laws of 1888, entitled "An act to amend §§ 491, 492, 503, 504, 505, 506, 507, 508, 509 of the Code of Criminal Procedure in relation to the infliction of the death penalty, and to provide means for the infliction of such penalty."

IV. Said statute is in conflict with the Constitution of the United States in that the punishment imposed thereby is cruel and unusual; and in that, thereby, the said State abridges the privileges and immunities of the said Kemmler to be exempt from cruel and unusual punishment for crime. 7

V. Said statute, moreover, is further in conflict with the Constitution of the United States, in that the punishment imposed thereby deprives said Kemmler of his life without due process of law; not only in this, that said mode of putting him to death is unlawful; but also in this, that the judicial function of fixing the time of his death is thereby taken from the Court and delegated to an executive officer or some uncertain substitute, upon some undefined and unaccountable cause. 8

Your petitioner therefore alleges that the commitment aforesaid and the detention under the warrant aforesaid, are null, void and of no force or validity and prays that this Honorable Court do forthwith issue the writ of habeas corpus to the said Charles F. Durston, Agent and Warden as a foresaid, requiring him to produce the body of said William Kemmler, before this Court, at some time to be designated in said writ, there to abide what shall be awarded by said Court in the premises. And at the same time he prays your Honors to issue out of said Court the writ of *certiorari* 9 to the Court of Oyer and Terminer of the County of Erie and the clerk thereof, commanding it or him forthwith to certify to said Circuit Court of the United States true copies of the indictment, record, orders and commitments in said Court remaining, under or by virtue of which said William Kemmler is now deprived of his liberty, by authority of that Court.

WILLIAM KEMMLER.

County of Cayuga, ss.:

WILLIAM KEMMLER, being duly sworn, says: I am the petitioner named in the foregoing petition; I

have read the same and know its contents, and the same is true to the best of my knowledge, information and belief.

WILLIAM KEMMLER.

Sworn to before me, this 28th day of April, 1890.

D. B. McNEIL,
Notary Public,
Cayuga Co.

IN THE SUPREME COURT OF THE UNITED STATES.

IN THE MATTER

of

The Application of WILLIAM KEMMLER for a writ of *habeas corpus*.

STATE OF NEW YORK, County of New York. } ss.:

ROGER M. SHERMAN, being duly sworn, says: I am an attorney and counselor of this Court and attorney for William Kemmler, the petitioner, upon this application. It appears from his petition, herewith, that from the first hour of the week ending May 3d, 1890, he was in constant and instant danger of death, at the hands of the Agent and Warden of Auburn Prison in the Northern District of New York. In that emergency, and under the circumstances hereinafter narrated, the Honorable William J. Wallace, the Circuit Judge of the United States for the Second Circuit, on the second day of that week, allowed the writ of habeas corpus, upon a petition in all substantial respects, like the one herewith; but addressed to the Circuit Court of the

said District and said writ was thereafter duly com- 13
pleted and served, returnable at the next day when it could be made returnable, to wit: the third Monday in June, at Canandaigua, when and where the next stated term of said Circuit Court is to be held.

At the same time Judge Wallace said to me in substance that the special circumstances of the case were such that the application ought to be made directly to the Supreme Court; that the Circuit Court ought not to be expected to interpose in proceedings which had been litigated through all the State Courts, and in effect required to review the judgments of the State Courts; and especially when 14
its interposition would stay the execution of a sentence, and possibly result in staying it until the next term of the Supreme Court; and it was only when it was represented to the judge that Kemmler might be executed before an application could be made to the Supreme Court that he allowed the writ. It was allowed by him upon the condition that an application should be made to the Supreme Court with the utmost diligence, and brought to the attention of the judges, so that they could consider it before the adjournment of the term, and in default thereof the writ should be vacated.

Judge Wallace said that he granted the writ in the great emergency to save life while a 15
fair question was presented for judicial inquiry; but with the understanding that I should make such an application as the present, and that, if this Court should issue its writ, then the writ allowed by him should be vacated.

This application is therefore made accordingly.

There was no default on my part, or on the part of any one associated with me, in a prompt application for the writ.

I did not consider myself authorized to make the application earlier than April 25th, 1890. I was not in any way before that engaged in behalf of the petitioner, and, while the former counsel in the case

16 had been at liberty to apply earlier for such a writ, the idea of so doing did not originate with them, nor was my application the result of any determination reached by them and transferred, for its execution to me. There was no laches on the part of anyone now counsel in the case.

Having now shown that an emergency existed, considered by Judge Wallace sufficient to justify the issue of the writ out of the Circuit Court, without prejudice to, and with the purpose of, its being supplanted by the writ of this Court; now to show the propriety of this application to speed the cause, I further say:

17 The pendency of the question in the Federal Courts, in effect, suspends the operation of the law for capital punishment for crime in the State of New York.

It also leaves the legislative department of the government in uncertainty what, if any, changes or amendment may be expedient to be enacted in that law. This uncertainty is not lessened by the principle of the decision in the State Courts, under the State Constitution. It was adjudged, in effect, solely, that the question whether the Legislature had violated the Constitution was a question exclusively for the determination of the Legislature, unless it appeared upon the face of the statute that

18 a punishment known judicially to the Courts to be cruel as well as unusual were imposed; that they could not receive evidence upon that point.

I annex a copy of the opinion of the Court of Appeals.

The question is here presented to the Federal Courts under the Eighth Amendment to the Constitution of the United States, upon a claim that the limited privilege or immunity of this citizen, thereunder, to be exempt from cruel and unusual punishment for crime, is, by the Fourteenth Amendment, extended and protected from encroachments by the State.

It is further claimed that, even if the Eighth Amendment has no original or derived application,

and merely by the operation of the Fourteenth Amendment alone, he may be by this Court preserved in life until the State of New York shall deprive him of it by "due process of law," despite the sentence under which he is now confined. 19

If this is not a federal question under the Eighth Amendment, yet the petitioner presses upon the Court that a State law violates the Fourteenth Amendment which deprives him of life without "due process of law." He insists that this statute does this :

1. By imposing a punishment which inflicts a painful death, and is beyond all question unusual. 20

2. By leaving to the discretion, absolute and uncontrolled, of an executive officer, one not to be presumed an expert, to determine the intensity of the electric current which shall be passed through this petitioner ; the conditions under which it shall be applied ; and only prescribing for his guidance that he shall continue the current selected by him until it kills, provided a week shall suffice for that purpose.

3. By leaving to the warden the power and duty to determine the day of the petitioner's death, instead of a day being fixed by the Court. 21

4. By the provisions for solitary confinement in addition to the death penalty.

5. By the provisions withholding knowledge of the period of his life from the petitioner until the moment of his destruction.

6. By the prohibition of a truthful report by the press of the execution, which deprives the criminal of a safeguard against cruel punishment.

22 7. Because it is a substantial departure from the essential features of the common law intended by the Fourteenth Amendment to be preserved.

ROGER M. SHERMAN.

Sworn to before me, this 3d day of May, 1890.

EMILE BENEVILLE,
Notary Public,
[L. S.] N. Y. Co.

23

COURT OF APPEALS.

THE PEOPLE *ex rel.* WILLIAM KEMMLER,
Appellant,

v.

CHARLES. F. DURSTON, Agent and Warden of Auburn Prison,
Respondent.

24 O'BRIEN, *J.*:—The respondent is the Agent and Warden of the State Prison of Auburn, and the relator, being in his custody, applied for a writ of *habeas corpus* to inquire into the cause of detention which was made returnable by the officer granting it before the County Judge of Cayuga County. The relator in his petition for the writ stated that the cause or pretense of the imprisonment complained of was that after his indictment and trial for the crime of murder in the first degree and his conviction thereof in the Court of Oyer and Terminer he was sentenced by that Court to undergo a cruel and unusual punishment for that crime, contrary to the Constitution of this State and of the United States,

and was threatened with deprivation of life without 25
due process of law by reason of such illegal sentence and judgment of the Court. The writ was duly served upon the respondent, who made return thereto that he detained the relator in his custody as Agent and Warden of the prison by virtue of the judgment of the Court of Oyer and Terminer, held in the County of Erie, whereby the relator was duly convicted of the crime of murder in the first degree, and also by virtue of a warrant duly delivered to him under the hand and seal of a justice of the Supreme Court presiding at the said Court of Oyer and Terminer where the relator was convicted, which recited the indictment, trial, conviction and sentence
of the relator and directed the respondent to carry 26
the same into effect in these words: "Now, therefore, you are hereby ordered, commanded and required to execute said sentence upon him, the said William Kemmler, otherwise called John Hort, upon some day within the week commencing on Monday, the 24th day of June, in the year of our Lord one thousand eight hundred and eighty-nine, and within the walls of Auburn State Prison, or within the yard or enclosure adjoining thereto, by then and there causing to pass through the body of him, the said William Kemmler, otherwise called John Hort, a current of electricity of sufficient intensity to cause death, and that the application of 27
such current of electricity be continued until he, the said William Kemmler, otherwise called John Hort, be dead."

This command and direction to the Warden was in accordance with the sentence actually passed upon the relator after conviction in these words: "The sentence of the Court is, that within the week commencing on Monday, the twenty-fourth day of June, in the year of our Lord, one thousand eight hundred and eighty-nine, and within the walls of Auburn State Prison, or within the yard or enclosure adjoining thereto, the defendant suffer the punishment of death, to be inflicted by the application of electricity, as provided by the Code of Criminal Procedure

28 of the State of New York, and that in the meantime the defendant be removed to, and until the infliction of such punishment be kept in solitary confinement in said Auburn State Prison."

On the return day of the writ, the relator and the respondent appeared by counsel before the County Judge, and by agreement of counsel the production of the relator, pursuant to the command of the writ, was waived. Counsel for the relator then offered to prove that the infliction of the penalty named in the sentence, namely, death by the application of electricity, is a cruel and unusual punishment within the meaning of the Constitution,
29 and cannot therefore be lawfully inflicted. The attorney-general objected, on the ground that the Court had no authority to take proof in regard to the constitutionality of the Statute. This objection was overruled by the County Judge, and the counsel for the respective parties agreed that a referee be appointed for the purpose of taking the testimony in pursuance of the offer.

In this way a mass of testimony was given upon both sides, certified by the referee to the County Judge, and embraced in the extended record before us. The result was, that after a hearing upon the report of the referee, the County Judge dismissed the
30 writ, and remanded the relator to the custody of the respondent. When it appeared from the return of the respondent that he detained the relator in custody under and by virtue of the judgment of a court of competent jurisdiction, wherein the relator was convicted of murder, it was the duty of the County Judge to dismiss the writ and remand the relator to the custody of the Agent and Warden of the prison, unless it could be shown that the Court of Oyer and Terminer was without jurisdiction to pass the sentence which it did.

People *ex rel.* Fry *v.* The Warden, etc., 100 N. Y., 20.

People *ex rel.* Tweed *v.* Liscomb, 60 *id.*, 559.

It is not denied that the Court had such jurisdiction, providing that the Legislature had power under the Constitution to enact Chap. 489 of the Laws of 1888, entitled "An Act to amend §§ 491, 492, 503, 504, 505, 506, 507, 508, 509 of the Code of Criminal procedure in relation to the infliction of the death penalty, and to provide means for the infliction of such penalty." Prior to the passage of this statute, the punishment by death in every case was to be inflicted by hanging the convict by the neck until he was dead. This provision of law was changed by the amendments of the Code above referred to, and now this section (505) reads as follows: "The punishment of death must in every case be inflicted by causing to pass through the body of the convict a current of electricity of sufficient intensity to cause death, and the application of such current must be continued until such convict is dead."

The only question involved in this appeal is whether this enactment is in conflict with the provision of the State Constitution which forbids the infliction of cruel and unusual punishment. Const. Art. 1, § 5. This provision was borrowed from the English Statute, passed in the first year of the reign of William and Mary, being Chap. 2 of the Statutes of that year, entitled "An Act declaring the rights and liberties of the subject, and settling the succession of the Crown," usually known as the Bill of Rights. It enacts, anong other things, that "excessive bail ought not to be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted." When this Statute was made part of the Constitution of the United States, the word "shall" was substituted for the word "ought," and in this form it first appears in the Constitution of this State, adopted in 1846. It is not very clear whether the provision as it stands in our Constitution was intended as an admonition to the Legislature and the judiciary, or as a restraint upon legislation inflicting punishment for criminal offenses. When the statute referred to was enacted in England, it

was not intended as a check upon the power of Parliament to prescribe such punishment for crime as it considered proper. Its enactment did not change any law then existing, nor did it mitigate the harshness of criminal punishments in that country, for more than half a century after it appeared on the Statute book, a long catalogue of offenses were punishable by death, many of which were not visited with that extreme penalty before the Bill of Rights was passed.

2 Shars. Blackstone's Com., Chap. 33, p. 440.

The history of the times in which this provision assumed the form of a law shows that it was, after all, intended to be little more than a declaration of the rights of the subject. The English people were about to place upon the throne, made vacant by revolution, a foreign prince, whose life had been spent in military pursuits, rather than in the study of constitutional principles and the limitations of power as then understood in the country he was to govern. This was considered a favorable opportunity to enact, in the solemn form of a Statute, a declaration of the principles upon which the people desired the government to be conducted. But whatever the purpose of this Statute was in the country where it originated, we think that its presence in the Constitution of this State confers power upon the Courts to declare void legislative acts prescribing punishments for crime, in fact cruel and unusual. This is the power that is invoked against the amendments to the Code of Criminal Procedure above referred to, by the learned counsel for the relator, in an argument addressed to us interesting on account of its great political and scientific research. We entertain no doubt in regard to the power of the Legislature to change the manner of inflicting the penalty of death. The general power of the Legislature over crimes, and its power to define and punish the crime of murder,

is not and cannot be disputed. The Amendments 37
prescribed no new punishment for this offense. The punishment now, as before, is death. The only change made is in the mode of carrying out the sentence. The infliction of the death penalty in any manner must necessarily be accompanied with, what might be considered in this age, some degree of cruelty, and it is resorted to only because it is considered necessary for the protection of society. The act, on its face, does not provide for any other or additional punishment.

In behalf of the relator this legislation is assailed in no other way than by attempting to show that the new mode of carrying out a death sentence subjects the person convicted to the possible risk of 38
torture and unnecessary pain. This argument would apply with equal force to any untried method of execution, and when carried to its logical results, would prohibit the enforcement of the death penalty at all. Every act of the Legislature must be presumed to be in harmony with the fundamental law until the contrary is clearly made to appear. Metropolitan Board of Excise *v.* Barrie, 34 N. Y., 666, 668; The People *v.* Briggs, 50 *id.*, 553, 558; The People *v.* Home Ins. Co., 92 *id.*, 328, 344; The People *v.* Albertson, 55 *id.*, 50, 54; The People *v.* Gillson, 109 *id.*, 389, 397; 16 N. Y. State Rep., 185; The People *v.* King, 110 N. Y., 418; 18 N. Y. State Rep., 353. If it cannot be made to appear that a law is in conflict with the Consti- 39
tution by argument, deduced from the language of the law itself or from matters of which a court can take judicial notice, then the act must stand. The testimony of expert or other witnesses is not admissible to show that in carrying out a law enacted by the Legislature some provision of the Constitution may possibly be violated.

The People *v.* Albertson, *supra.*
The People *v.* Draper, 15 N. Y., 532.
Matter of N. Y. Elev. R. R. Co., 70 id., 327.

40 If the act upon its face is not in conflict with the Constitution, then extraneous proof cannot be used to condemn it. The history and origin of the enactment we are now considering may very properly be referred to to test its validity, and ascertain its true intent and proper interpretation. It has been said that courts will place themselves in the situation of the Legislature, and by ascertaining the necessity and probable objects of the passage of a law, give effect to it, if possible, according to the intention of the law makers, when that can be done without violating any constitutional provisions.

People *v.* The Supervisors, 43 N. Y., 130.

41 Chapter 352 of the Laws of 1886, entitled "An Act to authorize the appointment of a commission to investigate and report to the Legislature the most humane and approved method of carrying into effect the sentence of death in capital cases," provided for the appointment of a commission consisting of three eminent citizens, who were named therein, and required them to investigate and report to the Legislature on or before the 4th Tuesday of January, 1887, the most humane and practical method known to modern science of carrying into effect the sentence of death in capital cases.

42 To enable this commission to make its investigation most thorough, the Legislature extended the time for it to report for a year longer by Chapter 7 of the Laws of 1887. This commission early in the legislative session of 1888 made its report, accompanied with a proposed bill, which the Legislature afterward, and during the same session, enacted, and this is the Statute which is now attacked in behalf of the relator as an unauthorized expression of the legislative will. The Legislature proceeded to change the mode of executing the sentence of death with care and caution and unusual deliberation. It would be a strange result indeed if it could now be held that its efforts to devise a more humane method of carrying out the sentence of death in

capital cases have culminated in the enactment of a 43
law in conflict with the provisions of the Constitution prohibiting cruel and unusual punishments. Whether the use of electricity as an agency for producing death constituted a more humane method of executing the judgment of the Court in capital cases, was a question for the determination of the Legislature. It was a question peculiarly within its province, and the means at its command for ascertaining whether such a mode of producing death involved cruelty, within the meaning of the constitutional prohibition, were certainly as satisfactory and reliable as any that are consistent with the limited functions of an Appellate Court. The determination of the Legislature of this question is 44
conclusive upon this Court. The amendment to the Code of Criminal Procedure changing the mode of inflicting the death penalty does not upon its face, nor in its general purpose and intent, violate any provision of the Constitution. The testimony taken by the referee, while not available to impeach the validity of the legislation, may, we think, be regarded as a valuable collection of facts and opinions touching the use of electricity as a means of producing death, and for that reason as part of the argument for the relator, but nothing more.

We have examined this testimony and can find but little in it to warrant the belief that this new 45
mode of execution is cruel, within the meaning of the Constitution, though it is certainly unusual. On the contrary, we agree with the Court below that it removes every reasonable doubt that the application of electricity to the vital parts of the human body, under such conditions, and in the manner contemplated by the Statute, must result in instantaneous, and consequently in painless death.

The order appealed from should be affirmed.

All concur.

46 **Chapter 489.**

An Act to amend sections four hundred and ninety-one, four hundred and ninety-two, five hundred and three, five hundred and four, five hundred and five, five hundred and six, five hundred and seven, five hundred and eight, and five hundred and nine of the Code of Criminal Procedure, relative to the infliction of the death penalty, approved by the Governor, June 4th, 1888. Passed, three-fifths being present. The people of the State of New York, represented in Senate and Assembly do enact as follows:

SECTION 1.—Section four hundred and ninety-one of the Code of Criminal Procedure of the State of
47 New York is hereby amended so as to read as follows:

§ 491. When a defendant is sentenced to the punishment of death, the judge or judges holding the Court at which the conviction takes place, or a majority of them, of whom the judge presiding must be one, must make out, sign and deliver to the Sheriff of the County, a warrant stating the conviction and sentence, and appointing the week within which sentence must be executed. Said warrant must be directed to the Agent and Warden of the State Prison of this State designated by law as the place of confinement for convicts sentenced
48 to imprisonment in a State Prison in the judicial district wherein such conviction has taken place, commanding such Agent and Warden to do execution of the sentence upon some day within the week thus appointed. Within ten days after the issuing of such warrant, the said Sheriff must deliver the defendant, together with the warrant, to the Agent and Warden of the State Prison therein named. From the time of said delivery to the said Agent and Warden, until the infliction of the punishment of death upon him, unless he shall be lawfully discharged from such imprisonment, the said defendant shall be kept in solitary confinement at said

State Prison, and no person shall be allowed access 49
without an order of the Court, except the officers of the prison, his counsel, his physician, a priest or minister of religion, if he shall desire one, and the members of his family.

§ 2. Section four hundred and ninety-two of said Code of Criminal Procedure is hereby amended so as to read as follows:

§ 492. The week so appointed must begin not less than four weeks and not more than eight weeks after the sentence. The time of the execution within said week shall be left to the discretion of the Agent and Warden to whom the warrant is 50
directed; but no previous announcement of the day or hour of the execution shall be made, except to the persons who shall be invited or permitted to be present at said execution, as hereinafter provided.

§ 3. Section five hundred and three of said Code of Criminal Procedure is hereby amended so as to read as follows:

§ 503. Whenever, for any reason other than insanity or pregnancy, a defendant sentenced to the punishment of death has not been executed pursuant to the sentence at the time specified, 51
thereby, and the sentence or judgment inflicting the punishment stands in full force, the Court of Appeals or a judge thereof, or the Supreme Court or a Justice thereof, upon application by the Attorney General or of the District Attorney of the county where the conviction was had, must make an order directed to the Agent and Warden or other officer in whose custody said defendant may be, commanding him to bring the convict before the Court of Appeals or a General Term of the Supreme Court in the department, or a term of the Court of Oyer and Terminer in the county where the conviction was had. If the defendant be at

52 large, a warrant may be issued by the Court of Appeals or a Judge thereof, or by the Supreme Court or a Justice thereof, directing any Sheriff or other officer to bring the defendant before the Court of Appeals or the Supreme Court at a General Term thereof, or before a term of the Court of Oyer and Terminer in that county.

§ 4. Section five hundred and four of said Code of Criminal Procedure is hereby amended so as to read as follows:

§ 504. Upon the defendant being brought before the Court, it must inquire into the circumstances,
53 and if no legal reason exists against the execution of the sentence, it must issue its warrant to the Agent and Warden of the State Prison mentioned in the original warrant and sentence under the hands of the judge or judges or a majority of them, of whom the judge presiding must be one, commanding the said Agent and Warden to do execution of the sentence during the week appointed therein. The warrant must be obeyed by the Agent and Warden accordingly. The time of the execution within said week shall be left to the discretion of the Agent and Warden, to whom the warrant is directed, but no previous announcement of the day or hour of
54 the execution shall be made, except to the persons who shall be invited or permitted to be present at said execution as hereinafter provided.

§ 5. Section five hundred and five of said Code of Criminal Procedure is hereby amended so as to read as follows:

§ 505. The punishment of death must in every case be inflicted by causing to pass through the body of the convict a current of electricity of sufficient intensity to cause death and the application of such current must be continued until such convict is dead.

§ 6. Section five hundred and six of said Code of 55
Criminal Procedure is hereby amended so as to read as follows:

§ 506. The punishment of death must be inflicted within the walls of the State Prison designated in the warrant or within the yard or inclosure adjoining thereto.

§ 7. Section five hundred and seven of said Code of Criminal Procedure is hereby amended so as to read as follows:

§ 507. It is the duty of the Agent and Warden to be present at the execution and to invite the pres- 56
ence by at least three days' previous notice, of a Justice of the Supreme Court, the District Attorney and the Sheriff of the county wherein the conviction was had, together with two physicians and twelve reputable citizens of full age, to be selected by said Agent and Warden. Such Agent and Warden must, at the request of the criminal, permit such ministers of the Gospel, priests or clergymen of any religious denomination, not exceeding two, to be present at the execution, and, in addition to the persons designated above, he may also appoint seven assistants or Deputy Sheriffs who may attend the execution. He shall permit no other person to be present at such execution except those desig- 57
nated in this section. Immediately after the execution a *post mortem* examination of the body of the convict shall be made by the physicians present at the execution and their report in writing stating the nature of the examination so made by them shall be annexed to the certificate hereinafter mentioned and filed therewith. After such *post mortem* examination the body, unless claimed by some relative or relatives of the person so executed, shall be interred in the graveyard or cemetery attached to the prison with a sufficient quantity of quick lime to consume such body without delay, and no religious or other services shall be held over the re-

mains after such execution, except within the walls of the prison where said execution took place, and only in the presence of the officers of said prison, the person conducting said services and immediate family and relatives of said deceased prisoner. No account of the details of any such execution beyond the statement of the fact that such convict was on the day in question duly executed according to law at the prison shall be published in any newspaper.

Any person who shall violate or omit to comply with any provision of this section shall be guilty of a misdemeanor.

§ 8. Section five hundred and eight of said Code of Criminal Procedure is hereby amended so as to read as follows:

§ 508. The Agent and Warden attending the execution must prepare and sign a certificate setting forth the time and place thereof, and that the convict was then and there executed in conformity to the sentence of the Court and the provisions of this Code, and must procure such certificate to be signed by all persons present and witnessing the execution. He must cause the certificate, together with the certificate of the *post mortem* examination mentioned in the preceding section and annexed thereto, to be filed within ten days after the execution, in the office of the clerk of the county in which the conviction was had.

§ 9. Section five hundred and nine of said Code of Criminal Procedure is hereby amended so as to read as follows:

§ 509. In case of the disability from illness or other sufficient cause of the Agent and Warden to whom the death warrant is directed, to be present and execute said warrant, it shall be the duty of the principal keeper of said prison, or such officer of said prison as may be designated by the Superin-

tendent of State Prisons, to execute the said war- 61
rant, and perform all the other duties by this Act imposed upon said Agent and Warden.

§ 10. Nothing contained in any provision of this Act applies to a crime committed at any time before the day when this Act takes place. Such crime must be punished according to the provisions of law existing when it was committed, in the same manner as if this Act had not been passed; and the provisions of law for the infliction of the penalty of death upon convicted criminals, in existence on the day prior to the passage of this Act, are continued in existence and applicable to all crimes punishable by death, which have been or may be com- 62
mitted before the time when this Act takes effect. A crime punishable by death committed after the beginning of the day when this Act takes effect, must be punished according to the provisions of this Act, and not otherwise.

§ 11. All Acts and parts of Acts inconsistent with the provisions of this Act are hereby repealed.

§ 12. This Act shall take effect on the first day of January, one thousand eight hundred and eighty-nine, and shall apply to all convictions for crimes punishable by death committed on or after that date. 63

IN THE SUPREME COURT OF THE UNITED STATES.

THE PEOPLE OF THE STATE OF NEW YORK, *ex rel.* WILLIAM KEMMLER,

Plaintiffs in Error,

vs.

CHARLES F. DURSTON, AGENT AND WARDEN OF AUBURN PRISON,

Defendant in Error.

ARGUMENT FOR PLAINTIFFS ON MOTION FOR A WRIT OF ERROR.

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Of Counsel for Plaintiff in Error,
140 NASSAU STREET,
New York.

In the Supreme Court of the United States.

THE PEOPLE OF THE STATE OF NEW YORK upon the relation of WILLIAM KEMMLER,
Plaintiff in Error,

against

CHARLES F. DURSTON, Agent and Warden of Auburn Prison,
Defendant in Error.

Motion for a Writ of Error. Brief for Plaintiffs in Error.

STATEMENT.

The relator is under sentence of death, pursuant to Chapter 489, New York Laws of 1888. His punishment is directed to be inflicted by the warden of Auburn Prison, who is commanded, upon some day, in his discretion, within a week fixed by the Court, which he is not to divulge beforehand to the prisoner, to cause to pass through the body of the convict a current of electricity of sufficient intensity to cause death, and to continue the application of such current until the convict is dead.

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The proceedings below were taken by petition for

the writ of *habeas corpus*. The Court of Appeals of New York has decided adversely to his contention that the statute and the proceedings thereunder are in conflict with the 14th amendment to the Constitution of the United States. The statute below, in addition to the new mode of execution, requires that the convict be kept in solitary confinement, and takes from the Court the power to fix the day of execution and confides it within the limit of a week, to the discretion of the warden of the prison.

The Courts below held that immunity of citizens of the United States from cruel and unusual punishment for crime was not, under any circumstances, within the protection of the Federal Constitution (Return on Appeal, fols. 4217, 4270).

The motion for this writ was first addressed to Mr. Justice Blatchford. It is now made here by leave of the Court.

ARGUMENT.

I.

Contention now is limited to the inquiry whether a Federal question was made and decided below; and whether the decision of that question below is so plainly right as not to require argument.

We assume, with entire confidence, that the determination of questions which the decisions of this Court have left open, will not be reached in this case upon the present motion, but upon the return to the writ and in due course of law.

Spies *v.* Illinois, 123 U. S., 164.

II.

The decision below, sustaining the statute, necessarily involved an adjudication that it was not a violation of the Federal Constitution.

Spencer *v.* Merchant, 125 U. S., 352.

The 14th amendment, section 1, provides that "no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property without due process of law."

III.

It is here insisted that "due process of law" to deprive a person of his life extends to the deprivation, the end; and excludes "cruel and unusual punishment."

IV.

The question is, further, made that this statute abridges the privileges and immunities of citizens of the United States because a cruel and unusual punishment for crime is thereby imposed.

It is insisted that immunity from such punishment is a privilege of citizens of the United States which no State law can abridge.

V.

The first inquiry then is whether in the mode of execution, or in the imposition of solitary confinement, or in the delegation of the judicial function of fixing the day of death, this statute prescribes "due process of law."

Wynehamer *v.* People, 13 N. Y., 378, Comstock, *J.:*

"To say, as has been suggested, that 'the law of the land or due process of law' may mean the very act of legislation which deprives the citizen of his rights, privileges or property would lead to a simple absurdity. The Constitution would then mean that no person shall be deprived of his property or rights unless the Legislature shall pass a law to effectuate the wrong; and this would be throwing the restraint entirely away."

In Davidson *v.* New Orleans, 96 U. S., 101, 102, 104, this Court said, Miller, *J.:*

"It must be confessed that the constitutional meaning or value of the phrase 'due process of law' remains to-day without that satisfactory precision of definition which judicial decisions have given to nearly all the other guarantees of personal rights found in the constitutions of the several States and of the United States.

"When in the year of grace, 1866, there is placed in the Constitution of the United States a declaration that 'no State shall deprive any person of life, liberty or property without due process of law,' can a State make anything due process of law, which by its own legislation it chooses to declare such? To affirm this is to hold that the prohibiton to the States is of no avail, or has no application where the invasion of private rights is effected under the form of State legislation."

* * * * * * * * *

"There is wisdom, we think, in the ascertaining of

the intent and application of such an important phrase in the Federal Constitution, by the gradual process of judicial inclusion and exclusion, as the cases presented for decision shall require, with the reasoning on which such decisions may be founded."

We regard this announcement from this Court as an invitation to us in this case to seek this writ of error.

In contending that a serious question exists, we have light from other decisions and expressions in this Court.

Thus in Murray's Lessee *v.* Hoboken Land and Improvement Co., 18 How., 276, 277, this Court says, Curtis, *J.*:

"To what principles then, are we to resort to ascertain whether this process, enacted by Congress, is due process? To this the answer must be twofold. We must examine the Constitution itself, to see whether this process be in conflict with any of its provisions. If not found to be so, we must look to these settled usages and modes of proceeding existing in the common and statute law of England, before the emigration of our ancestors and which are shown not to have been unsuited to their civil and political condition by having been acted upon by them after the settlement of this country."

In *The Slaughter House Cases*, 16 Wall, 118, Mr. Justice Field speaks of the expression "due process of law" as a declaration of the personal privileges and immunities of citizens, "above all, and including almost all the rest."

Wharton says of the prohibition of cruel and unusual punishment in the Federal Constitution: "The constitutional provision in this respect has been held not to apply to State Courts. Its principle, however, must be considered as part of the common law of each State."

3 Wharton's Crim. Law, Sec. 3405.

Due process of law then *excludes* cruel and un-

usual punishment. We are, happily, able to present an affirmative and "inclusive" proposition upon the second test stated by Mr. Justice Curtis.

The Courts of the State of New York had occasion in 1863 to resort to the common law to punish the crime of murder; the existing statute prescribing the punishment having been declared unconstitutional. The decision in that case was that the Revised Statutes which prescribed execution by hanging by the neck until death, and which had been repealed, were merely declaratory of the common law; that such punishment did not rest upon the statute for its authority; that the bill of rights preserved only that punishment and such was "due process of law" in that State.

Done *v.* People, 5 Parker's Crim. Rep., 382–388.
Lowenberg *v.* People, 27 N. Y., 342.

It may be, consistently with the constitutional limitation, that matters of administrative and remedial process may be changed from time to time; certainly no declaration of right expressly preserves an indictment or precludes the use of an information, as a mode of procedure in criminal cases.

The case of punishment, however, is not of minor consequence. Punishment is the ultimate purpose of all prosecutions for crime. That ultimate and final object to which all tends, cannot be relegated to the subordinate category of remedial process. If there is anything upon which the expression "due process of law" operates in criminal cases, assuredly it is the last step in the course of procedure: the process which deprives the person of life.

VI.

In the next place it is open to contention in this court, that the provision of the Fourteenth Amendment, which forbids a State to make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, is a prohibition to the State to impose cruel and unusual punishment.

In Spies *v.* Illinois, 123 U. S.. 131, 166, this contention was plainly made, and in the opinion it is thus dealt with:

Waite, *C. J.:* "It was contended, however, in argument, that, 'though originally the first ten amendments were adopted as limitations on Federal power, yet in so far as they secure and recognize fundamental rights—common law rights—of the man, they make them privileges and immunities of the man as a citizen of the United States, and cannot now be abridged by a State under the Fourteenth Amendment.' In other words, while the ten amendments, as limitations on power only apply to the Federal government and not to the States, yet in so far as they declare or recognize rights of persons, these rights are theirs as citizens of the United States, and the Fourteenth Amendment as to such rights limits State power, as the ten amendments had limited Federal power."

* * * * * * * * *

"Before considering whether the Constitution of the United States has the effect which is claimed, it is proper to inquire whether the Federal questions relied on in fact do arise on the face of this record."

This contention, then, was there disposed of by this Court, as in the various other cases since *the Slaughter House cases*, by deciding expressly or in effect, that the occasion had not yet arisen for its decision.

It is now clearly presented upon a negation of the proposition by the State Courts.

Should it not be decided in due course upon the record and not upon the refusal to entertain the question, as one of serious importance?

It is a question of the gravest importance. We submit that the 14th amendment changed this government from a confederacy of States to a Sovereign Nation; that it substituted for the illusions of State rights the clear conception of a sovereign allegiance and protection; a conception which demands a government willing and able to protect its citizens from all illicit enroachments upon their lives, their liberty and their property. If that clause contains no definition and enumeration of the privileges and immunities of citizens, it is because its words are of import too broad and comprehensive to omit any such, whether these enumerated in the declaration of rights or of rights which existed before.

The 8th amendment is referred to not as a source of privilege conferred thereby and for that reason subject to the restrictions of the donor. It must not be forgotten that it is a solemn recognition of rights which existed before.

As was said in Strauder *v.* West Virginia, 100 U. S., 307, Strong, J.:

"The words of the amendment it is true are prohibitory, but they contain a necessary implication of a positive immunity or right."

As was said in Brown *v.* Board, 50 Miss. 487:

"Property is older than governments and constitutions. The right to life, liberty and property was not conferred by society. The highest obligation of government is to defend and protect persons in their enjoyment. For centuries the inviolability of person and property against unusual and extraordinary invasions of power has been the birthright of British subjects. From their *Magna Charta* the principle has been transcribed into the American Constitutions."

2 Kent Com., 6, 8.

Immunity from cruel and unusual punishment

belongs of right to the citizens of all free governments. The right to life is a fundamental right and is subject to the control of society, for the prevention of crime; not for the infliction of torture.

If the earlier amendments which respect personal rights are not fundamental privileges of freemen, they are out of place in the fundamental law of the nation.

The argument is obsolete which rests upon the distinction between citizens of the States—the peculiar power and duty of States to conserve their personal rights; and citizens of the United States, with limited, doubtful and subordinate privileges.

The war and the 14th amendment have inverted all this. Citizenship in the Union is made the primary and paramount citizenship; allegiance to the Government of the United States of loftier obligation. Citizenship of the State is secondary and subordinate and State allegiance is of minor obligation.

Thus in the Slaughter House cases, 16 Wall, 95, 112, it is said:

"A citizen of a State is now only a citizen of the United States residing in a State."

* * * *

"Citizenship of the United States is the primary citizenship; State citizenship is secondary and derivative, depending upon citizenship of the United States."

Can the Government which demands paramount allegiance deny its protection to its citizens in their fundamental rights, against the encroachments of the subordinate State?

The demands of this twofold allegiance may conflict. In that case beyond all question that Government will be really supreme which fulfills the first duty of Government and in return for entire allegiance gives full protection to its citizens against all enemies.

VII.

If, then, it be open to contention in this Court that either as a privilege or immunity thereby protected, or as due process of law thereby preserved, the 14th amendment prohibits the infliction by a State of cruel and unusual punishment for crime, we come to the assertion that this statute of New York *does* impose such punishment.

What is cruel and unusual punishment for the crime of murder?

This question has been resolved in the Courts below upon a plain fallacy.

The assumption there has been that "cruel" is a term of comparative degrees, that it admits of comparison as: cruel, more cruel and most cruel; or cruel, less cruel and least cruel. The State Courts hold that the answer to the question depends upon a comparison of the proposed punishment with the old; and that the degree of pain inflicted is the standard to be applied.

We contend that the infliction of death is absolutely cruel and that its infliction by unusual means completes the act denounced.

Death is cruel, and its infliction by the electric force is unusual.

The constitutional provision is without force if it can be disposed of upon considerations of the degree of suffering, or upon the opinion upon that subject of any legislative body or court whatever.

The principle of construction involved is the same as in the case of an *ex post facto* law, where it is contended that a statute after the fact adds to the burden of punishment or alters the situation of the accused to his disadvantage. That is, the construction must be that which will give full security to the constitutional limitation, not on paper, but in effect.

In such a case in New York the Court of Appeals asserts the principle for which we contend.

Shepherd *v.* People, 25 N. Y., 406, 414.

Sutherland, *J.*: "If you do not hold a law punishing an act in a different manner than it was punishable when committed, to be *ex post facto, irrespective* of the question whether the new punishment is or is not more merciful or lenient, you will leave it to the discretion of the Legislature and of judges to say whether the new punishment is or is not more merciful or lenient than the old; and such a construction of the constitutional prohibition would impair its value and certainty of protection.

* * * * * * * *

"It is plain then that the moral or philosophical disquisition as to whether imprisonment for life at hard labor is better or more desirable or less severe than death has really nothing to do with the question.

"If it should be held that the Act of 1860 merely diminished the punishment with which the prisoner's crime was punishable when committed, because imprisonment for life at hard labor is generally considered a more lenient punishment than death or one which the criminal would prefer to suffer, then it could be held that a law changing the punishment of an act from imprisonment for a certain number of days or months to a fine, or from a certain number of stripes to imprisonment for a certain number of days, was not *ex post facto*, because the Court might think the new punishment more lenient than the old, or that the criminal would prefer to suffer the new punishment.

* * * * * * * *

"The question whether the law is *ex post facto* is thus left to judicial discretion; for a decision of the question must depend upon the opinion of judges as to whether the new punishment is more severe than the old, or whether the new punishment would or would not generally be preferred by criminals to the old. The construction of constitutional limitations should be left as little as possible to either legislative or judicial discretion."

A departure from the plain language of the Constitution in this case has led the Courts below into the very absurdity thus pointed out. The Courts accepted the principle of decision to be *an inquiry into the relative pain* inflicted in executions by hanging and by the electrical energy. Conceiving the inquiry to be one of fact, they accepted from the Legislature its determination of that question; and held that the Courts were thereby concluded. The Courts, they asserted, could not entertain proof that the new mode of punishment would inevitably inflict the greatest tortures ever conceived by man.

The result is that unless the law reveal in terms a purpose to evade the Constitution, the Court is bound by the declaration which the Legislature makes as to its own intentions; and that declaration stands in place of the facts to the contrary.

Due force cannot be given to the words of the Constitution, but by the construction of the word "cruel" as an absolute one.

If the meaning were that only less painful punishments should be substituted for those applied in 1789, the word "unusual" is unnecessary and out of place.

The fact is that hanging was not retained because it was not cruel, but because it was not also unusual. It was not the purpose of the bill of rights to open the door to any other death penalty. The prohibition of "more cruel" punishment would have admitted a question and have instituted a comparison between hanging and the various obsolete modes of execution; no doubt advocates could be found for any of them.

The declaration of rights, therefore, declared that if a punishment which is cruel, is also unusual, then no matter how cruel, or whether more or less painful than hanging, it shall never be imposed.

VIII.

The question here has been decided by a declaration that the Courts had no power to decide it. Whatever may be the rule in the Court of Appeals of New York, it is well settled that this Court does not sit to register the decision of a State Legislature upon the question whether its enactments conflict with the Federal Constitution. The inquiry is here original and independent, without regard to legislative forms.

Ohio L. and T. Co.. *v.* Debolt, 16 How, 432, 433.
Pease *v.* Peck, 18 How., 595.
Jefferson Bank *v.* Skelley, 1 Black., 436.
Butz *v.* City of Muscatine, 8 Wall, 582.
Douglass *v.* County of Pike, 101 U. S., 687.
Burgess *v.* Seligman, 107 U. S., 33.
Louisville & N. R. Co. *v.* Palmer, 109 U. S., 256.
Grenada County *v.* Brogden, 112 U. S., 269.

In Pease *v.* Peck, 18 How., 595, this Court said:

"There are many *dicta* to be found in our decisions averring that the Courts of the United States are bound to follow the decisions of the State Courts on the construction of their laws. But although this may be a correct, yet a rather strong, expression of a general rule, it cannot be received as the enunication of a maxim of universal application. Accordingly our reports furnish many cases of exception to it.

* * * * * *

"When the decisions of a State Court are not consistent we do not feel bound to follow the last, if it is contrary to our own convictions; and much more is this the case when, after a long course of consistent decisions, some new light suddenly

springs up *or an excited public opinion has elicited new doctrines subversive of former safe precedent.*

* * * * * *

"Parties who, by the Constitution and laws of the United States have a right to have their controversies decided in their tribunal, have a right to demand the unbiased judgment of the Court."

The principle of decision, adopted by the State Courts in this case, is in conflict with the long array of cases in that State asserting the independence of the judiciary in constitutional questions.

In Louisville Co. *v.* Palmer, 109 U. S., 256, this Court held that the decision by the State Courts as to whether there existed a valid contract which it was claimed a State Statute had impaired, was not binding on this Court; but that this question, although it involved a construction of State constitutions and laws, and was ordinarily exclusively of State cognizance, would be decided here as an original one, and independently of the decision of the State Court.

So here the question what in the State of New York is a cruel and unusual punishment for the crime of murder is one of Federal cognizance under the 14th amendment, although it involve the construction of the State Constitution and this Court is at liberty to differ from the Court of Appeals thereupon.

IX.

Before referring to the subject matter and effect of the electrical provisions in the New York statute we now submit the particular application of the 14th amendment to the features of solitary confinement and to the discretion devolved upon the warden to fix the day of death with its attendant incidents of secrecy.

A.

The condition of the law respecting solitary confinements has been fully stated in the opinion of this Court in

Ex parte Medley,

at the present term. It appears therefrom that such punishment has been in the name of humanity abandoned.

Thus it is said :

Miller, *J.* : " Thirty or forty years ago the whole subject attracted the general public attention and its main feature of solitary confinement was found to be too severe. * * * In Great Britain, as in other countries, public sentiment revolted against this severity, and by the Statute 6 and 7 William IV., Ch. 30, the additional punishment of solitary confinement was repealed.

* * * * * *

"The solitary confinement to which the prisoner was subjected by the statute of Colorado of 1889," (which is in this respect identical with this New York Statute), "was an additional punishment of the most important and painful character."

At the adoption of the 14th amendment in 1866, solitary confinement was no part of the punishment for murder in the State of New York.

B.

In respect of the time of execution, while we concede that at common law, not only the hour but the day of death was no part of the sentence, but was left to the discretion of the sheriff ; the law was changed by the Revised Statutes of New York, and when the 14th amendment was adopted, the law required that the warrant for execution should specify the time thereof. N. Y. Rev. St., Part IV., Ch. 1, Title 1, Sec. 24.

This requirement was held to be something

more than mere remedial or administrative process; and the change which delegates this power and duty of the Court to the warden of the State Prison is thus characterized by this Court in

Ex parte Medley.

Miller, *J.:*

"It is obvious that it confers upon the warden of the Penitentiary a power which had theretofore been solely confided to the Court; and is, therefore, a departure from the law as it stood when the crime was committed."

As well might a judgment authorize the sheriff to levy $5,000 or $10,000 in his discretion.

The difference would be in favor of the judgment leaving the amount to the sheriff; for no judicial duty or responsibility compares in gravity with that of sentencing a human being to death.

No tolerable answer can be based upon the consideration that the discretion is only for a week. There is no difference in principle between a week and a year, or ten years.

The former law, leaving to the sheriff to fix the hour in a day appointed by the Court proceeded upon an entirely different principle:

1. The law takes no account of the parts of a day, and such a sentence was to a day certain.

2. This discretion left a necessary margin of time for preparation and unforeseen emergencies.

This law on the contrary is part of a policy to shroud in mystery the most solemn and important function that society can perform; it encroaches upon the essential and fundamental principles of our common law. The case would be only more strikingly illegal, but not in principle different, if the trial itself, and all its incidents were made an executive function and likewise, secret and beyond the comments of the press.

Now, therefore, in respect to these provisions, we submit that the effect of the Fourteenth Amendment was to fix the law as it was in 1866, and to prohibit any change by the States which, being cruel, was then unusual, or which was not of the nature of mere remedial and administrative process.

The adoption of the Fifth Amendment to the Federal Constitution fixed "due process of law" for the Federal government within limits as it then existed.

Murray Lessee *v.* Hoboben Co., *supra.*

So the Fourteenth Amendment, in 1866, fixed "due process of law" for the States as then settled and existing in their common and statute law.

The provisions of the New York statute for solitary confinement, and which conceal the day of death from the prisoner and leave it to the warden, are, therefore, not to be sustained by the common law, but are in violation of the Fourteenth amendment.

X.

Finally as to the question as to the comparative humanity of the electric force and the rope.

In this inquiry the Courts below took a great mass of testimony of scientific men; of practical electricians; of persons who had received lightning strokes and the force of shocks artificially generated by dynamos.

The Court below refused to consider the evidence, on the ground that the Courts could not, upon a question of fact, reverse the decision of the Legislature.

But if it be once conceded that the Legislature may institute an inquiry into the relative torture of the two modes of execution, and thereupon deter-

mine that the electric force causes less physical suffering than the rope, it must be either that the Courts can follow and disapprove the legislative inquiry, or that the Legislature has, by the form of its enactment, evaded all judicial restraints upon the violation of the Constitution.

The plaintiff contends that this statute, by the inexorable logic of science, is shown to inflict torture. It is a grim irony in the Court to reply: the Legislature has investigated the question, and, with a profession of humane amendment of the law, has decided to the contrary.

There was once before in history such a conflict. At Rome in February, 1633, the Ecclesiastical law declared that the earth did not revolve around the sun. Centuries have passed since that condemnation of Galileo made memorable the ignorance of the tribunal which pronounced it. But now Science sits on the bench and her learning is part of judical knowledge.

This is a question of science and therefore a question of law.

The Court will take judical notice of the effect of this statute for it involves a law of nature. When a Court will take judical notice, it will inform itself at its discretion. It was proper to give proof addressed to this discretion:

Stephens' Digest of the Law of Evidence, article 58, subd. 11.

United States *v.* Teschmaker, 22 How., 392, 403.

Wagner's Case, 61 Me., 178.

McKinnon *v.* Bliss, 21 N. Y., 206, 213, 217.

The whole matter, instead of being dealt with by the law is devolved upon the unregulated discretion of the keeper of a prison. The law does not require him to be Mr. Edison, or Prof. Bell, or Mr. Westinghouse or Prof. Tyndall, or any other famous electrician. He may, consistently with any mandate of

the law, be without scientific attainments, without any capacity to determine, intelligently, between conflicting scientific claims. See fol. 4038–4042.

Therefore, he may determine in his discretion that he will begin, on the first hour of the week, by the application of a current of say 400 volts. If that current does not immediately kill, it must inevitably torture the victim (fol. 701–711).

Nevertheless the law gives the warden no discretion but to continue that current until it does kill; provided only, that it kills in a week.

There is scientific authority for the contention that 400 volts will kill.

Return on appeal (fol. 269).

But the probability upon the evidence is that it will kill only by searching the secret places of life and torturing them beyond the endurance of vitality; and that life will finally be given up as the result of pain.

Upon this evidence it appears that the witnesses for the defendant agree that the successful application of this force involves scientific attainments of great skill (fol. 1535).

The machines and instruments used involve great care in their construction and application (fols. 1105, 1182).

No result contemplated by the statute can be reached with any certainty whatsoever, but under the best scientific conditions.

The prisoner is thus subjected to the risk of torture; and, unless the best scientfic conditions chance to be adopted by the warden, to the absolute certainty of torture.

Return on appeal (fols. 91, 147, 151, 260, 262, 263, 267, 296, 323, 344, 345, 348, 382, 462, 466, 479, 482, 490, 496, 508, 1119, 1772 to 1843, 2325, 2335, 1591, 2084, 2728, 3908, 3895, 4018, 3742, 4227, 4249, 1753 *et seq.*, 1774 *et seq.*, 1864 *et*

seq., 1903 *et seq.*, 2001 *et seq.*, 2214 *et seq.*, 3300 *et seq.*, 2325 *et seq.*; (Rockwell's x-n.) to 2395, 3695 *et seq.*, 3623 *et seq.*, 3623 *et seq.*, 606 *et seq.*

A law which authorized the warden to go into the convict's cell with a rope at any time within a fixed week and secretly put him to death with it, would not leave to him more, no not so much, of what should by "due process of law" be part of the judicial sentence; than this burden of experiment thus unloaded by the Legislature upon the prison keeper, leaves to him.

As well might the law direct the convict to be executed by the attraction of gravitation. The direction of electricity embraces no narrower field. Its instruments present difficulties which would not in the other case, exist.

The warden might hang the convict by his heels until he died; or he might tie him hand and foot and leave him to die of terror and exhaustion; or he might garote him; he might cast him down from a height; or he might, as some savages do, after binding him, twist the bonds tighter and tighter until the wretch perished.

How is such a law different in principle from this?

If the warden thinks that 400 volts are enough, although all the experts whom the Court might regard as fit to speak, say that such current would be ~~mere~~ torture, what power exists, under this statute to prevent the warden from using such a current, and using it for a week, if necessary, until it kills?

But from general criticism we come to particulars. In the very language of the statute "a current of electricity" is a figure of speech. Even as such it does not describe what is proposed to be done under this law in this case. "Current" implies continuity; and the statute itself commands that the current shall be continued until the convict is dead. But the testimony of the chief expert for the State

of New York, *Harold P. Brown*, who has been employed to furnish the machines (fols. 36–43), shows that no continuous current is known that will cause death (fol. 147).

Although the statute is thus so repugnant that it cannot be enforced, Mr. Brown has assumed to follow the supposed intention of the statute and has supplied to the State Westinghouse dynamos of a maximum capacity of 1,050 volts, with which to generate a force which is the very reverse of a continuous current (fols. 37–46, 55, 454, 455, 510, 550, 567, 568, 574, 567–568). That dynamo remittently reverses the direction of the force and inflicts a series of shocks (fols. 594). Not electricity, but these shocks are relied upon to kill this plaintiff (fols. 151, 260, 348).

Thus the prescription of the Legislature is so unscientific and opposed to the natural law, that in order to enforce its surmised intention, its language is made nugatory and senseless. The miscalled "alternating current" is not a current and its application is an infinitely repeated application and discontinuance of the "current" (fol. 594). We find, moreover, in the practical effects of a statute thus repugnant and absurd, violence done to the first principles of the natural law. It is established that human beings, as well as animals, vary in their susceptibility to the electric influence (fols. 49, 55, 62, 72, 131, 135, 139, 160, 161, 167, 189, 198, 200, 284, 318, 425, 503, 553, 565, 566, 581–584, 1054, 1269, 1615–1673).

Thus the evidence presents many instances of persons struck by lightning under apparently the same conditions, some of whom were killed and others escaped with comparatively slight injuries (fols. 462, 463, 466, 542, 560, 720–746).

It presents instances of men killed by contact with electric wires conveying high potentials; while others under apparently the same conditions, were only burned, shocked or otherwise injured (fols. 91,

262, 263, 296, 344, 345, 462–466, 555, 556, 933, 1267, 1772–1843).

In cases of death no traces have been left to reveal the cause of death (fols. 233–257, 753, 1009, 1010, 1108).

Whether death is caused by some subtle influence peculiar to electricity, or by shock, or by polarization of the blood, or by disruption of the nerves and fibres no one can tell.

Return on appeal, fols. 151, 260, 348, 3742, 3895, 4018.

It is the universal testimony that unless death at once results, the force inflicts anguish beyond description.

It is said that the sufferer will be carbonized (fols. 514, 543–550,).

Or as the burning is not mere contact with heat, but is a chemical combustion along the line of the force, the convict would be mummified (fols. 751

Others assert that the straining of the nerves is such as to disrupt their fibre and rend even the minute blood-vessels (fol. 260).

A feature of uncertainty which cannot be too much emphasized proceeds from a phenomenon of this force. Electricity does not flow through a wire or conductor as water flows through the inside of a pipe.

On the contrary, a so called "conductor" is a substance which acts as the axis of the force. Electricity takes a direction along the surface of a conductor, and it is the office of insulation to keep it upon that surface (fols. 76, 77, 386, 546–549,

Now it is proposed to place a human body in a circuit of electricity, and to combat the natural law that the force will pass by upon the surface, and to compel it to penetrate and attack a vital part (fols. 62, 544, 549).

Violence is done to the natural law in the means

adopted to this end. The Court can see that in all probability the result will disappoint expectation and insure torture. First, it is proposed to ascertain the resistance of the body to be overcome, by the application of a Wheatstone bridge with a few cells of battery (fols. 55, 158, 221, 335, 443, 445, 537, 553, 539,).

The Wheatstone bridge is an instrument of known and conceded precision in measuring the resistance of metals. *Ibid.*

But the practical tests disclosed by the evidence show that its application to human beings clearly produces this result. The electricity thus conveyed to the human body immediately attracts to the surface the saline fluids and moistens the skin, thus reducing the resistance (fols. 167, 1054, 1079, 1082, 1243, 1321).

This is so marked that the second test in a few seconds almost always shows a great reduction of resistance. *Ibid.*

The importance of determining the resistance is apparent when it is stated that the resistance of human beings varies between different persons, from less than 1,000 ohms to 550,000 ohms (fols. 1615–1673).

It also varies greatly in the same person at different times. Nothing is known of the causes of this variation (fols 72, 189, 198, 200, 453, 1630, 1631,).

There is an experiment with a dog at the Edison laboratory, in evidence, where its resistance was twice measured at 200,000 ohms (fol. 49,).

No potential at their command could kill that dog (fols. 318,).

It is an accepted law that it requires one volt of electric force to impart sufficient energy to each ampere to overcome one ohm of resistance (fols. 153, 155,).

The dynamo supplied for this execution was of a capacity of 1,050 volts (fol. 485, 2509, 2511).

Its operation beyond that limit was uncertain and dangerous (fol. 2600, 2605, 2609).

Its capacity in amperes was ~~thirty-three~~ 22 amperes (fol. 685, 2021,).

It therefore was adequate to overcome a resistance of ~~34,650~~ 43,500 ohms. There is absolutely no certainty that this plaintiff's resistance at the time of execution would not be far in excess of the capacity of this machine (fol.).

We challenge our opponents to point out any evidence which establishes that this plaintiff's resistance at the time of execution could not be more than 40,000 ohms. Again, to avoid the burning at the point of contact of the electrodes it is proposed to remove the hair from the head (fol.).

To remove the surface oils with a caustic liquid (fol. 2492).

And to keep the place of contact constantly moistened with wet sponges, adequately wet to resist the drying effect of the intense heat for a considerable time (fol. 377–379, 1630, 2320).

This will indubitably moisten the surface for some distance from the contact (fols. 372–379, 560–559). 2430, 2713.

A wet electrode connected with the positive pole of the circuit is to be applied to the head and a ~~light~~ electrode with the negative pole to the base of the spinal column (fol. 2000).

The first plan was to attach the negative pole to the feet (fol. 85, 271, 380, 2315).

This has been abandoned.

The resistance of the skull is very great. With a thick bone greater, of course, than with a thin bone (fols. 923, 1224).

Now under all these conditions, if a "current" of electricity were continuously applied to this plaintiff (that is, a continuous current), it would be diffused over his surface; the result would undoubtedly be that, to an extent, the man would become part of the circuit; that he would not be instantly killed; that as that part of the circuit with most

resistance, he would supply the place of a carbon filament in the circuit of an incandescent light; upon his skin would be limited the friction and heat of the circuit; he would be cremated from the surface in (fols. 514, 415, 543, 544, 546, 549).

If this torture were to be inflicted at the stake, would there be any question of its unconstitutionality?

In the same conditions if an insufficient "alternating current" were applied the skull would resist the shocks and the force would be diffused over the surface with the same result; but with the added torture of remittent shocks.

Mr. Edison tells us how he placed the sciatic nerve of a frog's leg in connection with a telegraphic circuit between New York and Washington, and of the violent contortions with the interrupted current which enabled him to read the messages with the jump of the frog.

Return on Appeal, fol. 2517.

Some idea may thus be gathered of the humane results that are likely to follow the operation of this statute.

XI.

Whether under the statute and in scientific hands the contemplated experiment would be successful or not; yet it has been proved in this case, and the Court will upon this proof take judicial notice, that the State of New York is so enforcing its statute as in all human probability to torture the plaintiff (fols. 180, 271, 381, 468, 469, 501, 527, 528, 558, 597, 1491-1499, 1620).

As an independent proposition addressed to the

particular case, this plaintiff is entitled to the protection of the Federal Constitution.

In *Ex parte* Virginia, 100 U. S. 347, this Court said:

"The constitutional provision must mean no agency of the State, or of the officers or agents by whom its powers are executed * * * as he acts in the name of and for the State, and is clothed with the State's power his act is that of the State."

The State of New York by its agent is in this case upon the weight of the evidence about to deprive this plaintiff of his life by a cruel and unusual punishment and without due process of law. The Court of Appeals has not concluded this Court by its decision upon that fact, but has refused to consider the proofs for want of power.

This is a penal statute. It commands the agent to use a current which can be continued; because it commands him to continue it until death. He is about in contravention of that statute to use a force which is the reverse of this prescription. He is about to use it with circumstances which in other respects violate the conditions which the law as declared by the Courts below contemplates.

The possibility, under the law, of such a result condemns it:

U. S. *v.* Reese, 92 U. S., 214, 221.

"A penal statute which is in general language, broad enough to cover wrongful acts, without as well as within the constitutional jurisdiction, cannot be limited by judicial construction so as to make it operate only on that which Congress may rightfully prohibit and punish."

U. S. *v.* Harris, 106 U. S., 629, 642.
Baldwin *v.* Franks, 120 U. S., at p. 686.
Trade Mark Cases, 100 U. S., 82, 98, 99.
Hartung *v.* The People, 22 N. Y., at p. 106.

"As both parts may be inflicted and as the convict is under this law exposed to the double infliction, it is within the definitions an *ex post facto* law."

XII.

We have thus shown that there are Federal questions in this record which, at least, should not pass into the accepted and settled law of this country by a denial of the writ of error under the principle laid down in

Spies v. *Illinois.*

XIII.

In conclusion, we refer to the fact that a humane, eminent and learned Judge of the Circuit Court of the United States, well aware of the unsettled condition of several questions herein involved, has held, by the granting of a writ of *habeas corpus* to this plaintiff in error, under circumstances of exceptional delicacy and humanity, that, at least, a proper case is presented for judicial consideration.

We confidently believe that he will not receive the unmerited rebuke of a decision by this Court that there is no serious Federal question in this record.

XIV.

The writ of error should be granted.

ROGER M. SHERMAN,
Of Counsel for Plff. in Error,
140 Nassau street,
New York.

WASHINGTON, May 19, 1890.

Supreme Court of the United States,

OCTOBER TERM, 1889.

THE PEOPLE EX REL. WILLIAM KEMMLER

against

CHARLES F. DURSTON, AGENT AND WARDEN OF AUBURN PRISON.

IN RE THE PETITION OF WILLIAM KEMMLER FOR A WRIT OF ERROR.

BRIEF FOR AGENT AND WARDEN.

CHARLES F. TABOR,
Attorney-General of New York,
Of Counsel, Albany, N. Y.

Supreme Court of the United States,

OCTOBER TERM, 1889.

THE PEOPLE ex rel. WILLIAM KEMMLER

against

CHARLES F. DURSTON, Agent and Warden of Auburn Prison.

In re the Petition of WILLIAM KEMMLER for a Writ of Error.

Brief for Agent and Warden.

CHARLES F. TABOR,
Attorney-General of New York,
Of Counsel, Albany, N. Y.

SUPREME COURT OF THE UNITED STATES.

THE PEOPLE EX REL. WILLIAM KEMMLER

against

CHARLES F. DURSTON, AGENT AND WARDEN OF AUBURN PRISON.

IN RE THE PETITION OF WILLIAM KEMMLER FOR A WRIT OF ERROR.

STATEMENT.

It is understood and, therefore, assumed that this application is made for the purpose of obtaining a writ of error to review the judgment of the Court of Appeals in the above-entitled matter. The judgment of the Court of Appeals affirmed the judgment of the General Term of the Supreme Court of the Fifth Department, which latter judgment affirmed the order of the county judge dismissing the writ allowed by Mr. Justice Dwight, and remanding the said William Kemmler to the custody of the Agent and Warden of the State Prison at Auburn.

The petition for the writ appears at page 1027 of the record; the warrant under which the prisoner was held appears at page 1029; the writ at page 1031; the return of the agent and warden at page 1032; the judgment-roll upon conviction appears at pages 1035–42; the proceedings before the county judge upon the return day of the writ appear at pages 1044–46; the order of the county judge dismissing the

writ, 1051–52; opinion of the county judge, 1055–68; opinion of Dwight, Justice, at General Term, at pages 1069–81.

Upon the arraignment of the prisoner after his conviction, being asked "if he had any legal cause to show why "judgment should not now be pronounced against him," saith "No." (Fol. 4150)

Upon the return of the writ of *habeas corpus* before the county judge, the prisoner's attorneys offered to prove "that "the infliction of the penalty named in the sentence, that is to "say, the passing of an electrical current through the body of "said William Kemmler (in whose behalf the *habeas corpus* "has been allowed), is a cruel and unusual punishment, within "the meaning of the Constitution, and it cannot, therefore, be "lawfully inflicted, and to establish the facts upon which the "court could pass as to the character of the penalty. The "Attorney-General objected to the taking of testimony as to "the constitutionality of this law, on the ground that the "court has no authority to take such proof. The objection "was thereupon overruled, and the Attorney-General "excepted." (See folios 4166–68.)

The statute drawn in question by this writ of *habeas corpus* is chapter 489 of the Laws of 1888, and is entitled "An act "to amend sections 491, 492, 503, 504, 505, 506, 507, 508, 509 "of the Code of Criminal Procedure, relative to the infliction "of the death penalty, and to provide means for the inflic- "tion of such penalty."

The first step which led to the enactment of this law was a statement contained in the annual message of the Governor of the State of New York, transmitted to the Legislature January 6, 1885, and was as follows: "The present mode of "executing criminals by hanging has come down to us from "the dark ages, and it may well be questioned whether the "science of the present day cannot provide a means for

"taking the life of such as are condemned to die in a less "barbarous manner. I commend this suggestion to the "consideration of the Legislature."

Presumably, in pursuance of this suggestion, the Legislature of 1886, by chapter 352, appointed a committee, consisting of Elbridge T. Gerry, of New York; Dr. A. P. Southwick, of Buffalo, and Matthew Hale, of Albany, "to investigate "and report to the Legislature of the State of New York, on "or before the fourth Tuesday of January, 1887, the most "humane and practical method known to modern science of "carrying into effect the sentence of death in capital cases."

By chapter 7 of the Laws of 1887 the time for making the report by this commission was extended to the fourth Tuesday of January, 1888.

The committee reported, within the time provided by this statute, in favor of execution by electricity, and accompanied their report with a bill, which was enacted and became chapter 489 of the Laws of 1888.

The material changes made to the former statutes were:

First. The amendment to section 505, which provided as follows: "The punishment of death must in every case be "inflicted by causing to pass through the body of the convict "a current of electricity of sufficient intensity to cause death, "and the application of such current must be continued until "such convict is dead."

Second. The next material change was the amendment to section 491, and consisted in providing for a warrant stating the conviction and sentence, and appointing the week within which sentence must be executed, and was to be directed to the agent and warden, commanding him to do execution upon some day within the week thus appointed. The warrant was to be delivered to the sheriff, and within ten days

after the issuing of said warrant the sheriff was to deliver the convict, together with the warrant, to the agent and warden of the prison therein named, and from the time of the delivery aforesaid until the infliction of the punishment "the defend-"ant shall be kept in solitary confinement at said State prison, "and no person shall be allowed access to him, except the "officers of the prison, his counsel, his physician, a priest or "minister of religion, if he shall desire one, and the members "of his family."

Third. By the amendment to section 499 the time of execution within the week was left to the discretion of the agent and warden; and by amendment to section 506 the prisoner is to be executed within the walls or enclosure of the State prison.

Fourth. By the amendment to section 507 the execution of the warrant was made the duty of the agent and warden.

Fifth. By the amendment to section 509 it was provided "nothing contained in any provision of this act applies to a crime committed at any time before the day when this act takes effect. Such crime must be punished according to the provisions of law existing when it was committed," which provisions are continued for that purpose. It is further provided by the same section: "A crime, punishable by death, committed after the beginning of the day when this act takes effect, must be punished according to the provisions of this act, and not otherwise." It was further provided in this section that the act should take effect on the 1st day of January, 1889, and all inconsistent acts are thereby repealed.

By section 4, article 5 of the Constitution of this State, provision is made for the appointment of a superintendent of State prisons and the appointment of an agent and warden. The superintendent is to have "the management and control

of State prisons, subject to such laws as now exist or may hereafter be enacted."

Solitary confinement for misconduct of prisoners after sentence has always been a part of the prison system of the State of New York. (See section 55, article 2, title 2, chapter 3, part 4, volume 2, page 767, Revised Statutes [1st ed.]; and see section 76, page 949, volume 2, Revised Statutes [4th ed.].)

Copies of the opinion of O'Brien, Justice, in the Court of Appeals, in the matter of the *habeas corpus*, and of the opinion of Gray, Justice in the same court, upon the appeal from the judgment of conviction, are hereto attached.

POINTS.

I.

Section 2016 of the Code of Civil Procedure provides that a person is not entitled to a writ of *habeas corpus* in the following case:

"Subdivision 2. Where he has been committed or is "detained by virtue of the final judgment or decree of a com- "petent tribunal of civil or criminal jurisdiction * * * "or by virtue of an execution or other process issued upon "such a judgment, decree or final order."

Section 2019 (id.) provides that the petition for a writ must state in substance, among other things,

"Subdivision 2. That he has not been committed and is not "detained by virtue of any judgment, decree, final order or "process specified in section 2016 of this act."

Section 2032 (id.) provides the court or judge must forthwith make a final order to remand the prisoner if it appears

that he is detained in custody for either of the following causes:

"Subdivision 2. By virtue of the final judgment or decree "of a competent tribunal of civil or criminal jurisdiction, "* * * or by virtue of an execution or other process issued "upon such a judgment, decree or final order."

Section 2034 (id.) provides: "But a court or judge, upon "a return of a writ issued as prescribed in this article, shall "not inquire into the legality or justice of any mandate, "judgment, decree or final order specified in section 2032, "except as therein stated."

The United States Statutes provide (§ 753): "The writ of "*habeas corpus* shall in no case extend to a prisoner in jail, "unless where he is in custody or under or by color of the "authority of the United States, or is committed for trial "before some court thereof; or is in custody for an act done "or omitted in pursuance of a law of the United States, or of "an order, process or decree of a court or a judge thereof; *or* "*is in custody in violation of the Constitution or of a law or* "*treaty of the United States.*"

II.

The Supreme Court of the United States in giving construction to 753 (*supra*), has said:

(*a.*) "An imprisonment under a judgment cannot be unlaw- "ful unless that judgment be an absolute nullity, and it is "not a nullity if the court has general jurisdiction of the "subject, although it should be erroneous."

Ex parte Tobias Watkins, 3 Peters, 202, Marshall, Ch. J.

(*b.*) "The only ground on which this court or any court "without some special statute authorizing it, will give relief "on *habeas corpus* to a prisoner under conviction and sen- "tence of another court, is the want of jurisdiction in such "court over the person or the cause, or some other matter "rendering its proceedings void."

Bradley, J., Ex parte Siebold, 100 U. S., 375.

The principle of these cases was discussed and affirmed in In re Coy (127 U. S., 758 *et seq.*). And so in giving construction to the statute of the State of New York, allowing the writ of *habeas corpus*, the Court of Appeals of New York has said:

"If the judgment is merely erroneous, the court having "given a wrong judgment when it had jurisdiction, the "party aggrieved can only have relief by writ of error or "other process of review. He cannot be relieved summarily "by *habeas corpus*."

Allen, J., People ex rel. Tweed v. Liscombe, 60 N. Y., 570.
See, also, People ex rel. Wollf v. Jacobs, 66 N. Y., 8.

And in People ex rel. Lawrence v. Brady (56 N. Y., 192), Andrews, J., writing the opinion of the court, says:

"In this case the relator is restrained of his liberty; and a "decision under one writ refusing to discharge him did not "bar the issuing of a second writ by another court or officer."

Citing Ex parte Kaine, 3 Blatch., C. C. R., 1.

III.

The Penal Code of the State of New York, section 186, provides, "Murder in the first degree is punishable by death." This section of the statute was in full force at the time of the commission of the crime for which Kemmler was indicted, as well as at the time of his conviction and sentence. If there were no valid law in existence prescribing the mode and manner of inflicting this punishment of death, then it is not seen why, as at common law, the duty did not devolve upon the court authorized to pass the sentence "to determine "the mode of execution and to impose the sentence pre- "scribed."

Wilkinson v. Utah, 99 U. S., 137.
Lowenburg v. The People, 27 N. Y., 341–2.

The vice, if any, claimed by the petitioner was not in the trial or the judgment of conviction; but was in the sentence imposed by the court, and this was a matter that could not be corrected by a writ of *habeas corpus*, but only by appeal, and so the prisoner's counsel thought, for he took an appeal from the judgment of conviction, and, among other things, urged that the sentence imposed was "illegal and unconstitutional as being a cruel and unusual punishment." (See opinion of Gray, Justice, at the close of opinion.)

IV.

The authority of Kemmler to review the judgment of the Court of Appeals in the matter of his application for writ of *habeas corpus*, if it exists at all, is by virtue of section 709 of the Revised Statutes of the United States, which is as follows:

"*A final judgment or decree* in any suit in the highest court "of a State in which a decision in the suit could be had where

"is drawn in question the validity of a treaty or statute of, "or an authority exercised under the United States, and the "decision is against their validity, or where is drawn in "question the validity of a statute of, or an authority "exercised under any State, on the ground of their being "repugnant to the Constitution, treaties or laws of the United "States, and the decision is in favor of their validity; or where "any title, right, privilege or immunity is claimed under the "Constitution, or any treaty or statute of, or commission held "or authority exercised under the United States, and the "decision is against the title, right, privilege or immunity "specially set up or claimed by either party, under such "constitution, treaty, statute, commission or authority, may "be re-examined and reversed or affirmed in the Supreme "Court upon a writ of error," etc.

(*a.*) "The writ of error is not allowed as a matter of right."

Twitchell v. Commonwealth, 7 Wall., 321;
Spies v. Illinois, 123 U. S., 143.

(*b.*) "The writ will be denied if there is no Federal question "involved or if the decision complained of was, as regards "the Federal question, so plainly right as not to require "argument."

Spies v. Illinois, *supra.*
Brooks v. Missouri, 124 U. S., 394.

(*c.*) "The court must be able to see clearly from the whole "record that a certain provision of the Constitution or act of "Congress was relied on by the party who brings the writ of "error, and that the right thus claimed by him was denied."

Miller, J., Bridge Proprietors v. Hoboken Co., 1 Wall., 143.

(*d.*) "From the beginning it has been held that to give us "jurisdiction in this class of cases it must appear affirmatively "on the face of the record, not only that a Federal question "was raised and presented to the highest court of the State "for decision, but that it was decided or that its decision was "necessary to the judgment or decree rendered in the case."

Waite, Ch. J., Choteau v. Gibson, 111 U. S., 200.

(*e.*) "It is what was actually decided that we are to con- "sider, not what might have been decided; and as our juris- "diction must appear affirmatively on the face of the record "before we can proceed, the record must show, either in "express terms or by fair implication, not only the question "but its decision. It is not enough to find by searching after "judgment that the requisite question might have been "raised and presented for decision. It must appear that it "was actually raised and actually decided."

Detroit Railway Co. v. Guthard, 114 U. S., 136.

V.

The petition of Kemmler (page 1027, folio 4096 of the record) alleges:

"That contrary to the Constitution of the State of New "York and of the United States, and contrary to his objection "and exception, duly and timely taken in due form of law, he "was sentenced to undergo a *cruel and unusual punishment*, "as appears by a copy of the pretended judgment," etc.

On the return of the writ Kemmler's attorneys offered to prove that the infliction of the penalty named in the sentence "*is a cruel and unusal punishment within the meaning of* "*the Constitution.*" (Page 1045, folio 4166 of the record.)

An examination of the opinions of all the judges who delivered opinions discloses that the only constitutional question discussed by counsel or decided by the court was whether chapter 489 of the Laws of 1888 was in violation of article 8 of the amendments to the Federal Constitution, or to section 5 of article 1 of the State Constitution, which latter provision reads as follows:

"*Excessive bail shall not be required nor excessive fines "imposed nor shall cruel and unusual punishment be "inflicted nor shall witnesses be unreasonably detained.*"

The doctrine applicable to such a case has already been decided:

"This court will not take jurisdiction to review the action "of a State court if the Federal question, raised here, was not "raised below, and if no opportunity was given to the State "court to pass upon it."

Santa Cruz Supervisors v. Santa Cruz R. R. Co., 111 U S., 361.

VI.

It is apparent, therefore, upon an examination of the petition and opinions delivered in this case, that if any Federal question was discussed at all, it was whether chapter 489 of the Laws of 1888 was in violation of article 8 of the amendments to the Federal Constitution. So far as this question is concerned, all the judges held that this provision of the Constitution had no application to the States. They had the best of authority for so holding. This court said in the case of Spies v. Illinois (*supra*, p. 166), "that the first ten articles of "amendments were not intended to limit the powers of the "State governments, in respect to their own people, but to "operate on the National government alone, was decided

"more than half a century ago, and that decision has been "steadily adhered to since." And at least fifteen decisions are cited by the chief justice, who delivered the opinion of the court, to show that the proposition here advanced was true. It would seem, therefore, as if the State courts, in holding as they did in this matter, were amply justified by the authorities cited.

VII.

But it is understood that the claim is to be made that the Fourteenth Amendment to the Federal Constitution has been violated by the statute in question. This amendment, in part, provides as follows: "*No State shall make or enforce any* "*law which shall abridge the privileges or immunities of* "*citizens of the United States.*" This provision of the Fourteenth Amendment was fully considered and determined by this court in the Slaughter House Cases (16 Wallace, 36). In this case Mr. Justice Miller, who delivered the opinion of the court (page 77), says:

"Was it the purpose of the Fourteenth Amendment, by "the simple declaration that no State should make or enforce "any law which shall abridge the privileges and immunities "of citizens of the United States, to transfer the security and "protection of all the civil rights which we have mentioned "from the States to the Federal government? And where "it is declared that Congress shall have the power to "enforce that article, was it intended to bring within the "power of congress the entire domain of civil rights hereto- "fore belonging exclusively to the States?"

The learned judge then proceeds to a specification of the consequences which must follow if these propositions are sound, and he further says:

"Such a construction, followed by a reversal of the judg- "ments of the Supreme Court of Louisiana in these cases,

"would constitute this court *a perpetual censor upon all* "*legislation of the States on the civil rights of their own citi-* "*zens, with authority to nullify such as it did not approve* "*as consistent with those rights, as they existed at the time* "*of the adoption of this amendment.* The argument, we "admit, is not always the most conclusive which is drawn "from the consequences urged against the adoption of a "particular construction of an instrument. But when, as in "the case before us, these consequences are so serious, so far-"reaching and pervading, so great a departure from the "structure and spirit of our institutions; *when the effect is* "*to fetter and degrade the State governments by subjecting* "*them to the control of Congress in the exercise of powers* "*heretofore universally conceded to them of the most* "*ordinary and fundamental character;* when, in fact, it "radically changes the whole theory of the relations of the "State and Federal governments to each other, and of both "these governments, to the people the argument has a force "that is irresistible in the absence of language which "expresses such a purpose too clearly to admit of doubt."

And so in construing the Second Amendment to the Constitution of the United States, "*a well regulated militia being necessary to the security of a free State, the right of the people to keep and bear arms shall not be infringed,*" this court said:

"This is one of the amendments that has no other effect "than to restrict the powers of the National government, "leaving the people to look for their protection against any "violation by their fellow-citizens of the rights it recognizes, "to what is called in the City of New York v. Miln (11 Pet., "102, 139), the 'powers which relate to merely municipal "legislation, or what was, perhaps, more properly called

"internal police,' 'not surrendered or restrained' by the "Constitution of the United States."

116 U. S., 265.

But the Fourteenth Amendment further provides: "*Nor "shall any State deprive any person of life, liberty or "property without due process of law.*" And this court said in the Slaughter House Cases, concerning this amendment, that it "has been in the Constitution since the adoption of the "Fifth Amendment as a restraint upon the Federal power. "It is also to be found in some form of expression in the "Constitutions of nearly all the States as a restraint upon "the powers of the States. This law has, then, been practi- "cally the same as it now is during the existence of the "government, except so far as the present amendment may "place the restraining power over the States in this matter "in the hands of the Federal government. We are not "without judicial interpretation, therefore, both State and "National, of the meaning of this clause. And it is sufficient "to say that, under no construction of that provision that "we have ever seen, or that we deem admissible, can the "restraint imposed by the State of Louisana upon the "exercise of their trade by the butchers of New Orleans, be "held to be a deprivation of property within the meaning of "that provision."

16 Wall., page 80.

And in the case of Kennard v. Morgan (92 U. S., 483) this court, in construing a statute of Louisiana regulating proceedings between persons claiming a judicial office, where objection was made that the statute was in violation of the clause of the Fourteenth Amendment, last cited, said:

"A mere statement of the facts carries with it a complete "answer to all the constitutional objections urged against

"the validity of the act. * * * In this particular case "the party complaining not only had the right to be heard, "but he was, in fact, heard both in the court in which the "proceedings were originally instituted and upon his appeal "in the highest court of the State."

And in Davidson v. New Orleans (96 U. S., 104), Mr. Justice Miller, delivering the opinion of the court, says:

"*There is here abundant evidence that there exists some "strange misconception of the scope of this provision, as "found in the Fourteenth Amendment. In fact, it would "seem, from the character of many of the cases before us "and the arguments made in them, that the clause under "consideration is looked upon as a means of bringing to the "test of the decision of this court the abstract opinions of "every unsuccessful litigant in a State court, of the justice "of the decision against him, and of the merits of the "legislation on which such a decision may be founded.*"

And while the learned judge doubts the possibility of making a definition which would cover every exercise of power thus forbidden to the States, he further says (page 105):

"But, however this may be, or under whatever other "clause of the Federal Constitution we may review the case, "it is not possible to hold that a party has, without due pro- "cess of law, been deprived of his property, when, as regards "the issues affecting it, he has, by the laws of the State, a "fair trial in a court of justice according to the modes of "proceeding applicable to such a case."

And in the case of Missouri Pacific Railway Company v. Humes (115 U. S., 520), Mr. Justice Fields, delivering the opinion of the court, calls attention to the language of Mr. Justice Miller, referred to in the case of Davidson, as to

the misconception existing regarding the Fourteenth Amendment, and says:

"*This language was used in* 1877, *and now, after the* "*lapse of eight years, it may be repeated with an expression* "*of increased surprise at the continued misconception of the* "*purpose of the provision. If the laws enacted by a State* "*be within the legitimate sphere of legislative power, and* "*their enforcement be attended with the observance of those* "*general rules which our system of jurisprudence prescribes* "*for the security of private rights, the harshness, injustice* "*and oppressive character of such laws will not invalidate* "*them as affecting life, liberty or property without due pro-* "*cess of law. Within the present century the punishment* "*of death or long imprisonment was inflicted in England* "*for many offenses, which are not now visited with any* "*severer penalty than a fine or short confinement, yet no one* "*has ever pretended that life or liberty was taken thereby* "*without due process of law.*"

And the same learned justice, in Barbier v. Connolly (113 U. S., 31), in giving construction to this clause of the Fourteenth Amendment, says: "It was undoubtedly intended, "not only that there should be no arbitrary deprivation of "life or liberty or arbitrary spoliation of property, but that "equal protection and security should be given to all under "like circumstances in the enjoyment of their personal and "civil rights: that all persons should be equally entitled to "pursue their happiness and acquire and enjoy property. "That they should have like access to the courts of the "country for the protection of their persons and property " * * * and that in the administration of criminal "justice no different or higher punishment should be imposed "upon one than such as is prescribed to all for like offenses. "*But neither the amendment, broad and comprehensive as*

"*it is, nor any other amendment, was designed to interfere*
"*with the power of the State, sometimes termed its police*
"*power to prescribe regulations to promote the health, peace,*
"*morals, education and good order of the people, and*
"*to legislate so as to increase the industries of the State,*
"*develop its resources and add to its wealth and prosperity.*"

VIII.

"Whatever differences of opinion may exist as to the extent
"and boundaries of the police power, and, however difficult
"it may be to render a satisfactory definition of it, there
"seems to be no doubt that it does extend to the protection
"of the lives, health and property of the citizens, and to the
"preservation of good order and the public morals. The
"Legislature cannot, by any contract, divest itself of the
"power to provide for these objects. They belong emphatic-
"ally to that class of objects which demand the application
"of the maxim, *salus populi suprema lex;* and they are to
"be attained and provided for by such appropriate means as
"the legislative discretion may devise. That discretion can
"no more be bargained away than the power itself."

Beer Co. v. Mass., 97 U. S, 33.

"The principle, that no person shall be deprived of life,
"liberty or property, without due process of law, was
"embodied, in substance, in the constitutions of nearly all,
"if not all, of the States at the time of the adoption of the
"Fourteenth Amendment; and it has never been regarded as
"incompatible with the principle, equally vital, because
"essential to the peace and safety of society, that all property
"in this country is held under the implied obligation that the
"owner's use of it shall not be injurious to the community."

Mugler v. Kansas, 123 U. S., 665.

And again in Minneapolis Railway Company v. Beckwith (129 U. S., 26), it was held that the Fourteenth Amendment to the Constitution *does not limit the subjects in relation to which the police power of the State may be exercised for the protection of its citizens.*

And so in the case of Kidd v. Pearson (128 U. S., 1), it was held that the police power of a State is as broad and plenary as the taxing power, and property within the State is subject to the operation of the former, so long as it is within the regulating restrictions of the latter.

And see Hurtado v. California (110 U. S., 516), for a discussion of the question what constitutes "*due process of law.*"

And in Powell v. Pennsylvania (127 U. S., 683), Mr. Justice Harlan, in construing the statute of Pennsylvania in reference to the manufacture of oleomargarine, says:

"It is scarcely necessary to say that if this statute is a "legitimate exercise of the police power of the State for the "protection of the health of the people and for the prevention "of fraud, it is not inconsistent with the Fourteenth Amend-"ment, for it is the settled doctrine of this court that, as "government is organized for the purpose, among others, of "preserving the public health and the public morals, it can-"not divest itself of the power to provide for those objects, "*and that the Fourteenth Amendment was not designed to* "*interfere with the exercise of that power by the States.*"

IX.

It is understood that the counsel for Kemmler, upon this application for a writ of error, makes the contention that the infliction of death by electricity, under the statute of 1888, *is* "*a cruel and unusual punishment,*" and that the limited privilege or immunity under the Eighth Amendment of the

Federal Constitution was, by the Fourteenth Amendment, extended and protected from encroachment upon the part of the States. It is impossible to see how this contention can be maintained under the decisions already cited, and particularly within the principle of the case of Spies v. Illinois (123 U. S., 131).

X.

It is perfectly evident, from an examination of the record in this case, that the only question decided by the Court of Appeals was, "*that chapter* 489 *of the Laws of* 1888 *was* "*not in violation of section* 5 *of article* 1 *of the State Consti-* "*tution.*" That being so, the decision of the Court of Appeals, on the construction of the Constitution and statute of New York, will be followed by this court.

Township of Ellenwood v. Macy, 92 U. S., 289.
Fairfield v. Gallatin Co., 100 U. S., 47.
Machine Co. v. Gage, 100 U. S., 677.
Hall v. De Cuir, 95 U. S., 500.

Bank of Redemption v. Boston 125 U.S. 68

XI.

Besides, the Legislature of the State of New York, "upon the fullest investigation as we must conclusively presume" (Powell v. Penn., *supra*, 686), has determined that the statute in question is in the interest of good morals and public policy, and that it inflicts no cruel and unusual punishment in violation of any constitution. Neither this court nor any other court can say, from anything of which it may take judicial cognizance, or from anything that appears from the record presented here, that the enforcement of this statute will inflict cruel and unusual punishment, within the sense or meaning of the State or Federal Constitutions. Upon the contrary,

"*every possible presumption is in favor of the validity of* "*the statute, and this continues until the contrary is shown* "*beyond a rational doubt. One branch of the government* "*cannot encroach on the domain of another without* "*danger. The safety of our institutions depend in no* "*small degree on a strict observance of this salutary rule.*" (Chief Justice Waite in Sinking Fund Cases 99 U. S., 718; cited with approval by Mr. Justice Harlan in Powell v. Penn., *supra*, 684.)

XII.

This court, in Wilkerson v. Utah (99 U. S., 134), discussed that provision of the Federal Constitution which forbids cruel and unusual punishment. And the court, on page 135, refers to some of the cases mentioned by Blackstone iu his Commentaries as to the sentences to be pronounced by the courts in capital cases, and which he states generally consists of being hanged by the neck until dead. But Mr. Justice Clifford says:

"Such is the general statement of that commentator, "but he admits that in very atrocious crimes other circum- "stances of terror, pain or disgrace were sometimes superadded. "Cases mentioned by the author are, where the prisoner was "drawn or dragged to the place of execution in treason, "or where he was emboweled alive, beheaded and quartered "in high treason. Mention is also made of public dissection "in murder, and burning alive in treason committed by a "female. * * * Difficulty would attend the effort to "define with exactness the extent of the constitutional pro- "vision, which provides that cruel and unusual punishment "shall not be inflicted; but it is safe to affirm that punish- "ments of torture, such as those mentioned by the com- "mentator referred to, and all others in the same line of

"unnecessary cruelty, are forbidden by that amendment to "the Constitution."

The principles here enunciated were in no way disputed or denied by the people or the courts in the case of Kemmler under consideration.

XIII.

Judge Dwight at General Term, in referring to the evidence taken before the referee and printed with the record, says:

"We have read with much interest the evidence returned "to the county judge, and agree with him that the burden of "the proof is not successfully borne by the relator. On the "contrary, we think that the evidence is clearly in favor of "the conclusion that it is within easy reach of electrical "science at this day to so generate and apply to the person "of the convict a current of electricity of such known and "sufficient force as certainly to produce instantaneous, and "therefore painless, death."

Folio 4296 of record.

And Mr. Justice O'Brien, in delivering the opinion of the Court of Appeals, says, with reference to this question:

"We have examined this testimony and can find but little "in it to warrant the belief that this new mode of execution "is cruel within the meaning of the Constitution, though it is "certainly unusual. On the contrary, we agree with the "court below that it removes every reasonable doubt that "the application of electricity to the vital parts of the human "body under such conditions and in the manner contem-"plated by the statute, must result in instantaneous and "consequently in painless death."

In view of what these judges have said, it would seem to be an entirely unnecessary, if not improper, proceeding upon the part of this court to read and examine a thousand pages of testimony for the simple purpose of discovering whether all of the State courts were not, after all, wrong in regard to this admitted question of fact.

XIV.

It may be claimed by the petitioner's counsel that the case of Medley, reported in No. 19, volume 10 of the Supreme Court Reporter, page 884, has something to do with the questions now before this court in this proceeding. It is enough to say that this case is only authority for the doctrine that a prisoner must be discharged from custody where he has been convicted and is in custody under a State law which, as to him, is *ex post facto*. Section 10 of article 1 of the Federal Constitution expressly prohibits the States from passing any *ex post facto* laws.

XV.

Therefore, it is confidently submitted that, as all of the questions which this court is asked to consider upon a writ of error in this matter have already been settled by this court, the motion for a writ should be summarily denied.

Foster v. Kansas, 112 U. S., 206.

CHARLES F. TABOR, ATTORNEY-GENERAL,

Attorney for Agent and Warden.

MARCH 21st, 1890.

THE PEOPLE EX REL. WILLIAM KEMMLER, *Appellant.*

against

CHARLES F. DURSTON, AGENT AND WARDEN OF AUBURN PRISON, *Respondent.*

W. Bourke Cockran, for appellant.

Chas. F. Tabor, Attorney-General, for respondent.

O'BRIEN, J. The respondent is the Agent and Warden of the State Prison at Auburn, and the relator being in his custody, applied for a writ of *habeas corpus* to inquire into the cause of detention, which was made returnable by the officer granting it, before the county judge of Cayuga county. The relator in his petition for the writ stated that the cause or pretense of the imprisonment complained of was that, after his indictment and trial for the crime of murder in the first degree, and his conviction thereof in the Court of Oyer and Terminer, he was sentenced by that court to undergo a cruel and unusual punishment for that crime, contrary to the Constitution of this State and of the United States, and was threatened with deprivation of life without due process of law by reason of such illegal sentence and judgment of the court. The writ was duly served upon the respondent, who made return thereto, that he retained the relator in his custody as agent and warden of the prison by virtue of the judgment of the Court of Oyer and Terminer, held in the county of Erie, whereby the relator was duly convicted of the crime of murder in the first degree, and also by virtue of a warrant duly delivered to him under the hand and seal of a justice of the Supreme Court, presiding at the said Court of Oyer and Terminer where the relator was convicted, which recited the indictment, trial, conviction and sentence of the relator, and directed the respondent to carry the same into effect in these words:

"Now, therefore, you are hereby ordered, commanded and "required to execute said sentence upon him, the said William "Kemmler, otherwise called John Hort, upon some day within "the week commencing on Monday, the 24th day of June, in

"the year of our Lord one thousand eight hundred and eighty-
"nine, and within the walls of Auburn State prison, or within the
"yard or enclosure adjoining thereto, by then and there causing to
"pass through the body of him, the said William Kemmler, other-
"wise called John Hort, a current of electricity of sufficient
"intensity to cause death, and that the application of such current
"of electricity be continued until he, the said William Kemmler,
"otherwise called John Hort, be dead."

This command and direction to the warden was in accordance with the sentence actually passed upon the relator after conviction, in these words:

"The sentence of the court is, that within the week commencing
"on Monday, the 24th day of June, in the year of our Lord one
"thousand eight hundred and eighty-nine, and within the walls of
"Auburn State prison, or within the yard or enclosure adjoining
"thereto, the defendant suffer the punishment of death to be
"inflicted by the application of electricity, as provided by the Code
"of Criminal Procedure of the State of New York, and that in
"the meantime the defendant be removed to, and until the inflic-
"tion of such punishment, be kept in solitary confinement in said
"Auburn State prison."

On the return day of the writ the relator and the respondent appeared by counsel before the county judge, and by agreement of counsel the production of the relator, pursuant to the command of the writ, was waived. Counsel for the relator then offered to prove that the infliction of the penalty named in the sentence, namely, death by the application of electricity, is a cruel and unusual punishment within the meaning of the Constitution, and cannot, therefore, be lawfully inflicted. The Attorney-General objected on the ground that the court had no authority to take proof in regard to the constitutionality of the statute. This objection was overruled by the county judge, and the counsel for the respective parties agreed that a referee be appointed for the purpose of taking the testimony in pursuance of the offer.

In this way a mass of testimony was given upon both sides, certified by the referee to the county judge, and embraced in the extended record before us. The result was that after a hearing upon the report of the referee the county judge dismissed the

writ and remanded the relator to the custody of the respondent. When it appeared from the return of the respondent that he detained the relator in custody under and by virtue of the judgment of a court of competent jurisdiction, wherein the relator was convicted of murder, it was the duty of the county judge to dismiss the writ and remand the relator to the custody of the agent and warden of the prison, unless it could be shown that the Court of Oyer and Terminer was without the jurisdiction to pass the sentence which it did. (People ex rel. Fry v. The Warden, etc., 100 N. Y., 20; People ex rel. Tweed v. Liscomb, 60 N. Y., 559.)

It is not denied that the court had such jurisdiction providing that the legislature had power, under the Constitution, to enact chapter 489 of the Laws of 1888, entitled "An act to amend sec- "tions 491, 492, 503, 504, 505, 506, 507, 508, 509 of the Code of "Criminal Procedure in relation to the infliction of the death "penalty, and to provide means for the infliction of such penalty." Prior to the passage of this statute the punishment by death in every case was to be inflicted by hanging the convict by the neck until he was dead. This provision of law was changed by the amendments of the Code above referred to, and now the section (505) reads as follows:

"The punishment of death must in every case be inflicted by "causing to pass through the body of the convict a current of "electricity of sufficient intensity to cause death, and the applica- "tion of such current must be continued until such convict is dead."

The only question involved in this appeal is whether this enactment is in conflict with the provision of the State Constitution, which forbids the infliction of cruel and unusual punishment. (Const., art. 1, § 5.) This provision was borrowed from the English statute passed in the first year of the reign of William and Mary, being chapter two of the statutes of that year, entitled "An act declaring the rights and liberties of the subject, and settling the succession of the crown," usually known as the Bill of Rights. It enacts, among other things, that "excessive bail ought not to be required nor excessive fines imposed nor cruel and unusual punishment inflicted." When this statute was made part of the Constitution of the United States the word "shall" was substituted for the word "ought," and in this form it first appears in the Constitution

of this State adopted in 1846. It is not very clear whether the provision as it stands in our Constitution was intended as an admonition to the legislature and the judiciary, or as a restraint upon legislation, inflicting punishment for criminal offenses. When the statute referred to was enacted in England, it was not intended as a check upon the power of parliament to prescribe such punishment for crime as it considered proper. Its enactment did not change any law then existing, nor did it mitigate the harshness of criminal punishments in that country for more than half a century after it appeared on the statute book. A long catalogue of offenses were punishable by death, many of which were not visited with that extreme penalty before the Bill of Rights was passed. (2 Shars. Blackstone's Com., chap. 33, p. 440.)

The history of the times in which this provision assumed the form of a law shows that it was, after all, intended to be little more than a declaration of the rights of the subject. The English people were about to place upon the throne, made vacant by revolution, a foreign prince, whose life had been spent in military pursuits rather than in the study of constitutional principles and the limitations of power as then understood in the country he was to govern. This was considered a favorable opportunity to enact, in the solemn form of a statute, a declaration of the principles upon which the people desired the country to be conducted. But whatever the purpose of this statute was in the country where it originated, we think that its presence in the Constitution of this State confers power upon the courts to declare void legislative acts prescribing punishment for crime, in fact, cruel and unusual. This is the power that is invoked against the amendments to the Code of Criminal Procedure, above referred to, by the learned counsel for the relator, in an argument addressed to us, interesting on account of its great political and scientific research. We entertain no doubt in regard to the power of the legislature to change the manner of inflicting the penalty of death. The general power of the legislature over crimes, and its power to define and punish the crime of murder, is not and cannot be disputed. The amendments prescribed no new punishment for this offense. The punishment now, as before, is death. The only change made is in the mode of carrying out the sentence. The infliction of the death penalty in any manner must necessarily be accompanied with, what might be considered in this age, some degree

of cruelty, and it is resorted to only because it is considered necessary for the protection of society. The act on its face does not provide for any other or additional punishment. In behalf of the relator, this legislation is assailed in no other way than by attempting to show that the new mode of carrying out a death sentence subjects the person convicted to the possible risk of torture and unnecessary pain. This argument would apply with equal force to any untried method of execution, and, when carried to its logical results, would prohibit the enforcement of the death penalty at all. Every act of the legislature must be presumed to be in harmony with the fundamental law until the contrary is clearly made to appear. (Metropolitan Board of Excise v. Blaine, 34 N. Y., 666, 668; The People v. Briggs, 50 N. Y., 553, 558; The People v. Home Ins. Co, 92 N. Y., 328, 344; The People v. Albertson, 55 N. Y., 50, 54; The People v. Gilson, 109 N. Y., 389, 397; The People v. King, 110 N. Y., 418.) If it cannot be made to appear that a law is in conflict with the Constitution, by argument deduced from the language of the law itself or from matters of which a court can take judicial notice, then the act must stand. The testimony of expert or other witnesses is not admissible to show that in carrying out a law enacted by the legislature some provision of the Constitution may possibly be violated. (The People v. Albertson, *supra;* The People v. Draper, 15 N. Y., 532; Matter of the Elevated R. R Co., 70 N. Y., 327.)

If the act, upon its face, is not in conflict with the Constitution, then extraneous proof cannot be used to condemn it. The history and origin of the enactment we are now considering may very properly be referred to to test its validity, and ascertain its true intent and proper interpretation. It has been said that courts will place themselves in the situation of the legislature, and by ascertaining the necessity and probable objects of the passage of a law, give effect to it, if possible, according to the intention of the law-makers, when that can be done without violating any constitutional provision. (People v. The Supervisors, 43 N. Y., 130.) Chapter 352 of the Laws of 1886, entitled "An act to authorize the appoint-"ment of a commission to investigate and report to the legislature "the most humane and approved method of carrying into effect "the sentence of death in capital cases," provided for the appointment of a commission consisting of three eminent citizens, who

were named therein, and required them to investigate and report to the legislature on or before the fourth Tuesday of January, 1887, the most humane and practical method known to modern science of carrying into effect the sentence of death in capital cases. To enable this commission to make its investigation most thorough, the legislature extended the time for it to report for a year longer by chapter 7 of the Laws of 1887. This commission early in the legislative session of 1888 made its report, accompanied with a proposed bill, which the legislature afterwards, and during the same session, enacted, and this is the statute which is now attacked in behalf of the relator as an unauthorized expression of the legislative will. The legislature proceeded to change the mode of executing the sentence of death, with care and caution and unusual deliberation. It would be a strange result, indeed, if it could now be held that its efforts to devise a more humane method of carrying out the sentence of death in capital cases have culminated in the enactment of a law in conflict with the provisions of the Constitution prohibiting cruel and unusual punishments. Whether the use of electricity as an agency for producing death constituted a more humane method of executing the judgment of the court in capital cases was a question for the determination of the legislature. It was a question peculiarly within its province, and the means at its command for ascertaining whether such a mode of producing death involved cruelty, within the meaning of the constitutional prohibition, were certainly as satisfactory and reliable as any that are consistent with the limited functions of an appellate court. The determination of the legislature of this question is conclusive upon this court. The amendment to the Code of Criminal Procedure changing the mode of inflicting the death penalty does not upon its face, nor in its general purpose and intent, violate any provision of the Constitution. The testimony taken by the referee, while not available to impeach the validity of the legislation, may, we think, be regarded as a valuable collection of facts and opinions touching the use of electricity as a means of producing death, and for that reason as a part of the argument for the relator, but nothing more. We have examined this testimony and can find but little in it to warrant the belief that this new mode of execution is cruel, within the meaning of the Constitution, though it is certainly unusual. On the contrary, we agree with the court below that it

removes every reasonable doubt that the application of electricity to the vital parts of the human body, under such conditions and in the manner contemplated by the statute, must result in instantaneous, and consequently in painless, death.

The order appealed from should be affirmed.

All concur.

MARCH 21st, 1890.

THE PEOPLE, *Respondent*,

against

WILLIAM KEMMLER, ETC., *Appellants*,

C. W. Sickmon, for appellants.

George T. Quinby, district attorney, for respondent.

GRAY, J. The defendant was indicted for the killing of Matilda Zeigler, and, after trial at the Erie County Court of Oyer and Terminer, he was found guilty of murder in the first degree. He was thereupon sentenced to suffer the punishment of death, to be inflicted by the application of electricity, as provided by the Code of Criminal Procedure. The killing by the defendant was conclusively proved. No attempt was even made to dispute that fact, as established by his admissions to several persons and by the circumstantial proof; but the defense relied upon was the mental irresponsibility of the prisoner, which was attempted to be shown to be the result of the effects of the habitual use of alcoholic stimulants, and of hereditary taints of drunkenness and of consumption in the mother. The deceased was the paramour of the defendant. They had eloped from Philadelphia, where she had left her husband, and he his wife. They were residing together in Buffalo, and the deceased came to her death as the result of repeated blows upon her head and body from a hatchet in the defendant's hands. No justification or excuse for the act of killing was attempted by him, and in the brief of his counsel none is offered. We are led by the evidence to infer that jealousy of the deceased and domestic broils, stimulated, I should judge, by his constant drunkenness, furnished the motive for this brutal crime. But whether we can attribute the commission of the act to some

certain motive or not is wholly immaterial. The fact of the deliberate killing and the absence of any palliative proofs leave the defendant liable for the legal consequences of his act; unless from the evidence it could be found that his mind was so enfeebled as to render him an irresponsible member of human society. A consideration of the case leaves the mind unembarrassed in reaching the conclusion that the defendant was possessed of sufficient mental capacity to understand the nature of his act and to distinguish right from wrong. The record before us discloses the commission of the crime early in the morning of March 29, 1888. The defendant, under the assumed name of John Hort, was a huckster of market produce, and had a wagon, which he kept in a barn in the rear of his residence. Upon that morning he was about the barn, giving orders to his employes and attending to his horses and to various matters. He was quite sober and presented no unusual appearance. The deceased came out from the house to the barn and asked for some eggs, which defendant got for her from his wagon. He went into the house after her and then attacked her by blows of a hatchet, the noise of which was heard by some of the witnesses, and by one witness in an adjoining room; in addition to the hacking noise, the scream of the woman. The defendant was then seen coming out of the house wiping blood from his hands. The woman was found upon her arms and knees upon the floor, swaying to and fro, with blood upon and about her. She was removed to a hospital and the next day died from the wounds she had received upon her head, which counted over twenty in number. The defendant, to inquiries from persons who saw him immediately after the occurrence, said he had killed her and would "take the rope for it," or "I want to hang; I want the rope."

The evidence shows that the defendant and deceased had at times quarreled because of his drinking; and she had threatened to return to Philadelphia. A man named De Bella was employed by defendant in his business, and was on intimate terms with him and the deceased; in the sense of being an inmate of the family and a companion in the defendant's carouses. It was testified that the defendant, subsequently to the murder, said that he was jealous of De Bella, and he may have questioned the relations between his wife and him. Many witnesses were examined by his counsel, with respect to the defendant's habits of life, and one, a medical expert, gave his testi-

mony as to the effects of the continued use of alcohol upon the human system. As to the first class of witnesses, their evidence amounted to nothing more than to establish the fact that the defendant was a hard and habitual drinker and was frequently intoxicated. These witnesses were mostly the companions of his sprees, or the witnesses of his drunken debauches. The medical witness had examined the prisoner in the morning, before he gave his evidence, and his opinion was that he was a man of weak intellect, of imperfect brain development, and more or less incapacitated to appreciate what transpired before him. These conditions he thought were indicated by the prisoner's physical appearance and the conversation he had had with him. He also, upon a hypothetical question, gave evidence that such a mind would be unsound and incapable of discriminating as to the quality of his acts. But the hypothetical question did not state the exact case of the prisoner, as developed by all of the evidence, respecting his life and habits, and those circumstances which give the truthful color and semblance to human life and conduct. It dealt with probabilities, and not with realities. Expert evidence is only, it seems to me, entitled to such importance in arriving at a judgment, when fairly given by one properly accredited to give it, through his experience, study and scientific eminence, and upon a hypothesis which shall be true in the relation of its parts to the whole case, which is the subject of inquiry. The frequent spectacle of scientific experts differing in their opinions upon a case, according to the side upon which retained, tends much to discredit such testimony; or to impair its force and usefulness, and inclines us to prefer the formation of an opinion upon the real facts when the case is not one beyond the penetration and grasp of the ordinary mind. Here we have, as against this expert evidence for the prisoner, that of two physicians, more or less qualified to pronounce upon the question of insanity from the physicial appearance of the subject, to the effect that there was nothing in the prisoner's physical make-up upon which an opinion of the prisoner's unsoundness of mind could be based. They expressed the opinion that he was able to distinguish between right and wrong, and that his conduct, on the fatal morning, and subsequently, displayed a consciousness of the nature and quality of his act. But, beyond that kind of evidence, we have ample testimony of a more satisfactory kind, from those who knew and who were constantly in a

habit of seeing and of transacting business with him. From that evidence the defendant appears to have had a sufficient amount of intelligence and sagacity to conduct his business affairs with a measurable degree of success.

All the facts respecting his habits of life, the conduct of his affairs, his appearance and actions before, at the time of, and subsequent to the commission of the criminal act, were before the jury, and we cannot say that there was any absolute or positive, or preponderating evidence of unsoundness or enfeeblement of mind, to warrant our interfering with this verdict.

We are asked to review some exceptions. It was argued that the court erred in permitting the testimony of witnesses as to quarrels between the defendant and deceased; as to conversations between them, and as to statements of the defendant to others in relation to the desire of the deceased to return to Philadelphia. Such evidence, however, tends to show the existence of motives in the defendant and of possible influences acting upon his mind; and it is proper in aid of the jury's investigations of the occurrence and of its probable or possible causes.

It is urged that the court erred in permitting the physicians, called as witnesses for the People, to testify as to the mental condition of the prisoner. The argument is that either the relation of patient and physician existed, or else the prisoner was compelled to furnish evidence against himself. These physicians were sent to the jail by the district attorney to make an examination of the prisoner's mental and physical condition. On the stand they were not inquired of as to the conversations had with him, or as to the transactions in the jail. Their testimony was simply their opinion of his mental condition as they saw him in his cell and in the court-room; but they gave no evidence of his statements or of his physical condition. Such evidence is quite unobjectionable. In the case of People v. Stout (3 Park. Crim. Rep., 670), the visiting physicians attended and prescribed for the injured prisoner, and they were allowed to describe his condition. That was held to be an error, but no such feature exists in this case.

An exception was taken to the refusal of the court to charge: "That in fixing the grade of crime, of which the defendant is "charged, the evidence of his intoxication becomes very important, "and must be carefully weighed." But the court, in response, did

charge that "all the evidence in the case is to be carefully weighed; "but it is not in the province of the court to tell you what is "important or otherwise. You are to determine the importance of "the testimony." We think the court committed no error in refusing to charge in the precise words of the request.

Under our system of procedure, it would not be improper for the trial judge to characterize the evidence of a fact or of a condition of things as important upon the trial of a case, but he is under no obligation to make any comments of that nature. He may state the evidence and call attention to its features, and even express an opinion upon its weight, if the question is fairly left to the jury. It is their province to determine the conclusiveness of its bearing upon the guilt or innocence of the accused.

Finally, it is urged that when the jury returned to the court room and desired instructions upon certain points in regard to the evidence of certain witnesses, and as to the definitions of the first and second degrees of murder, the court erred in the giving of its further instructions, after the reading of the evidence referred to in the foreman's request. But the court, in its instructions, covered no more ground than before in the main charge, and simply pointed out those proofs which bore upon the commission of the act of killing. Such instructions were asked for, in effect. There was no objection made at the time to a compliance with the request of the jury, and a consideration of their tenor does not reveal any bias or hostile instruction, by which the prisoner might have been prejudiced. The details were ghastly enough to require no comment, as the facts were sufficiently undisputed to speak eloquently for themselves. The trial was most fairly conducted by the prosecution, and every effort was made to avoid improper evidence, and to eliminate the presence of technical as well as substantial objections. The court was equally solicitous in the conduct of the trial to prevent the introduction or retention of improper and illegal evidence, and in the charge fully, fairly and correctly stated the facts to the jury, and the rules of law which were applicable to the issue they were to decide. They were instructed that they must acquit if the prisoner were irresponsible, and they were told that, though voluntary intoxication did not make the act less criminal, yet in determining the

purpose, motive or intent with which the act was committed, they might take into consideration the fact of intoxication.

A last point is made on this record, and that is that the sentence imposed is illegal and unconstitutional, as being a cruel and unusual punishment. As that is the subject of review upon another record, and will be discussed by another member of this court, I shall not stop to consider it here. I may add, however, that I think the point untenable. Punishment by death, in a general sense, is cruel; but as it is authorized and justified by a law adopted by the people as a means to the end of the better security of society, it is not cruel within the sense and meaning of the Constitution. The infliction of the death penalty through a new agency is, of course, unusual; but, as death is intended as the immediate sequence of the mechanical application prescribed, it is not unusual in the sense that some certainly prolonged or torturous procedure would be understood to be. In my judgment, we should assume that the enactment of the legislature was based upon some investigation of facts, and where the declared purpose and end of the law are the infliction of death upon the offender, we may not say, upon the ground-work of possibilities and guess-work, that it is, in any sense, an unconstitutional act, because a new mode is adopted to bring about the death.

There is no feature of this case which, in my opinion, mitigates the atrocity of the defendant's conduct; or any error of law which calls for another trial.

I therefore advise the affirmance of the judgment rendered upon the verdict of the jury.

All concur.

(A copy): H. E. SICKELS,
Reporter.
Per C.